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THE

LAW OF WILLS AND SUCCESSION.

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THE

LAW OF WILLS AND SUCCESSION

AS ADMINISTERED IN SCOTLAND,

INCLUDING

TRUSTS, ENTAILS, POWERS, AND EXECUTRY.

BY

THE HON. JOHN M'LAREN,

JUDGE OF THE COURT OF SESSION AND HIGH COURT OF JUSTICIARY.

THIRD EDITION.

IN TWO VOLUMES.

VOL. I.

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PREFACE.

THE First Edition of this contribution to the judicially established Law of Scotland was published under the name of the Law of Trusts, and by a wide extension of that title it included the greater part of what forms the subject of the Second Volume of this Edition. On republication, the scope of the work was extended so as to comprehend the whole subject of Succession, Testate and Intestate, including rights under Marriage Settlements and Deeds of Entail and Provision. The book has been out of print for many years, and in the interval which has elapsed since the publication of the last edition some chapters of the law have become entirely obsolete, while in other departments there has been an expansion so great as to render the task of selecting and digesting the Authorities very difficult.

In order to adapt the book to the present state of the law the greater part of the text has been re-written. Some changes have also been made in the arrangement of the subject-matter, but these are unimportant. The general arrangement and scope of the work is unaltered. The writer has not thought it necessary to verify the Authorities cited in the previous editions, because these were all examined in preparing the original text, and it is believed that substantial accuracy was attained. The preparation of this edition has occupied all the time of the writer which was not given to public duties during the last eighteen months.

The references to English sources of authority have not been materially extended. The labour of examining the English Reports of the last twenty-five years would have indefinitely delayed the publication of the Edition, and would not have added much to its value, because for the purposes of illustration leading cases only are useful. References on all important points are given to

the latest editions of the chief English text-books on the subjects of Wills, Executry, and Trusts, and such recent English cases as are quoted in the decisions of our Courts have been noticed.

The writer has in general abstained from offering his opinion on controversial questions, as to which he might possibly be called on to adjudicate ; but, of course, there may be differences of view as to what questions are controversial. No limiting line can be drawn between what is settled in principle and what may be open to discussion as being unsettled or exceptional. Such opinions as may be found in the book must be taken as the impressions of a student ; no prætorian authority is claimed for them.

EDINBURGH, *October* 1894.

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ALPHABETICAL LIST OF THE ENGLISH EQUITY REPORTS (CHANCERY EXCHEQUER IN EQUITY, AND HOUSE OF LORDS), WITH THEIR ABBREVIATIONS.

Amb.	Ambler's Reports, 2 vols.—1737 to 1784.
Atk.	Atkyns, 3 vols.—1736 to 1755.
Barn. C. . . .	Barnardiston's Chancery Cases, 1 vol.—1740 to 1741.
Beav.	Beavan, 33 vols.—1838 to 1864.
Bli.	Bligh's Appeal Cases, 3 vols.—1819 to 1821.
Bli. N. S. . . .	Bligh's Appeal Cases, New Series, 11 vols.—1827 to 1837.
Br. Ch. Ca. . .	Brown's Chancery Cases, 4 vols.—1778 to 1794.
Br. Par. Ca. . .	Brown's Cases in Parliament, 8 vols.—1702 to 1800.
Cary	Cary's Reports, 1 vol.—1557 to 1604.
Ch. Cas. . . .	Cases in Chancery, 1 vol.—1660 to 1688.
Ch. Ca. Ch. . .	Choice Cases in Chancery, 1 vol.—1557 to 1606.
Cas. *t.* Talb. . .	Cases *temp.* Talbot, 1 vol.—1734 to 1738.
Cl. & Fin. . . .	Clark and Finelly's Appeal Cases, 12 vols.—1831 to 1846.
Colles	Colles' Cases in Parliament, 1 vol.—1697 to 1714.
Coll.	Collyer, 2 vols.—1844 to 1845.
G. Coop. . . .	George Cooper, 1 vol.—1815.
Cox	Cox's Chancery Cases, 2 vols.—1783 to 1796.
Cr. & Ph. . . .	Craig and Phillips, 1 vol.—1841.
Dan.	Daniell, Exchequer Equity, 1 vol.—1817 to 1819.
De G. F. & J. . .	De Gex, Fisher, and Jones, 2 vols.—1859 to 1861.
De G. & J. . .	De Gex and Jones, 4 vols.—1857 to 1859.
De G. J. & S. . .	De Gex, Jones, and Smith, 2 vols.—1862 to 1864.
De G. M. & G. .	De Gex, Macnaghten, and Gordon, 8 vols.—1851 to 1857.
De G. & Sm. . .	De Gex and Smale, 5 vols.—1846 to 1852.
Dick.	Dickens, 2 vols.—1559 to 1798.
Drew.	Drewry, 4 vols.—1852 to 1859.
Drew. & Sm. . .	Drewry and Smale, 2 vols.—1860 to 1862.
Dow	Dow's Appeal Cases, 6 vols.—1812 to 1818.
Dow & Cl. . . .	Dow and Clark's Appeal Cases, 2 vols.—1827 to 1832.
Eden	Eden's Reports, 2 vols.—1757 to 1767.
Eq. Ca. Abr. . .	Equity Cases Abridged, 2 vols.

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Hare . . . . . Hare's Reports, 11 vols.—1841 to 1853.
Hem. & M. . . . Hemming and Miller, 2 vols.—1862 to 1865.

Jac. . . . . Jacob, 1 vol.—1821 to 1822.
Jac. & W. . . . Jacob and Walker, 2 vols.—1819 to 1821.
John. . . . . Johnson, 1 vol.—1859.
John. & H. . . Johnson and Hemming, 2 vols.—1860 to 1862.
Jur. . . . . English Jurist, containing Reports in the Common Law and Equity Courts.

Kay . . . . . Kay's Reports, 1 vol.—1853 to 1854.
Kay & J. . . . Kay and Johnson, 4 vols.—1854 to 1858.
Keen . . . . . Keen's Reports, 2 vols.—1836 to 1838.
Kel. . . . . Kelynge, 1 vol.—1731 to 1736.

L. J. Ch. . . . Law Journal, Chancery Reports, commencing 1832.
L. R. . . . . English Law Reports, the current Series, commencing 1865.

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Sim. N. S. . . . Simons, New Series, 2 vols.—1850 to 1852.

Sim. & St. . . .	Simons and Stuart, 2 vols.—1822 to 1826.
Sm. & Gif. . . .	Smale and Giffard, 3 vols.—1852 to 1857.
Sw.	Swanston, 3 vols.—1818 to 1819.
Taml.	Tamlyn, 1 vol.—1829 to 1830.
Toth.	Tothill, 1 vol.—1559 to 1646.
Turn. & R. . . .	Turner and Russell, 1 vol.—1822 to 1824.
Vern.	Vernon, 2 vols.—1681 to 1720.
Ves. sen. . . .	Vesey, senior, 3 vols.—1747 to 1756.
Ves.	Vesey, junior, 22 vols.—1789 to 1816.
V. & B.	Vesey and Beames, 3 vols.—1812 to 1814.
West, H. L. . .	West's Appeal Cases, 1 vol.—1839 to 1841.
West & H. . . .	West, Cases *temp.* Hardwicke, 1 vol.—1736 to 1739.
Wils. Ch. . . .	Wilson's Chancery Cases, 1 vol.—1818 to 1819.
Wils. Ex. Eq. . .	Wilson, Exchequer Equity—1817.
You.	Younge, Exchequer Equity, 1 vol.—1830 to 1832.
Y. & C. Ch. Ca. .	Younge and Collyer's Chancery Cases, 2 vols.—1841 to 1843.
Y. & C. Ex. Eq. .	Younge and Collyer, Exchequer Equity, 4 vols.—1833 to 1841.

LAW OF SCOTLAND

IN RELATION TO

WILLS AND SUCCESSION.

PART I.

CHAPTER I.

OF DOMICILE.

1. Domicile in General.
2. Domicile of Origin.
3. Domicile of Choice.
4. Wife's Derivative Domicile.

SECTION I.

Domicile in General.

Sources of authority on the law of domicile.

1. In the investigation of rights of succession, the first question for consideration is, by what system of law the succession is regulated. In relation to personal succession, the law of the domicile of the deceased person is the governing law. Hence the ascertainment of the domicile is an inquiry which precedes all others. The rules according to which the domicile of a person is to be ascertained are *juris gentium;* and, in their application to practice, the courts of each country are bound to have regard to the opinions of jurists and the decisions of foreign tribunals, so far as consistent with the principles of general jurisprudence. Yet in every country reliance will naturally be placed on the precedents established by the decisions of its own courts, and for this reason the illustrations here given are taken chiefly from the decisions of the Courts of England and Scotland. The authorities in the general literature of jurisprudence will be found collected in the works of Burge[1] and Story.[2] It would be foreign to our purpose to paraphrase the researches of these learned authors; and the writer could not hope by independent investigation to make any material addition to the citations which they have accumulated.[3]

[1] Burge's Commentaries on Colonial and Foreign Law, part i. chap. 2.

[2] Story's Conflict of Laws, chap. 3.

[3] The observations of the Civil Law commentators on the subject of domicile will be found, in connection with those

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Idea of a national domicile.

2. National Domicile is a term employed to signify the relation which an individual sustains to the country or place where he has actually, or *fictione juris*, his principal and permanent residence. We say actually or by fiction of law, because the determination of this, as well as other legal relations, is governed by rules which are more or less arbitrary in their nature, and which, when applied to particular cases, may fix the domicile of an individual in a country which is not, in the ordinary acceptation of the term, the seat of his principal and permanent residence.

Domicile as defined in the Code.

3. The primary conception of a domicile has never been more happily expressed than in the graphic description preserved by the compilers of the Code:—"Et in eodem loco singulos habere domicilium, non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde non sit discessurus, si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit."[1] In this passage all the elements included in the notion of a domicile are distinctly specified: (1) the actual residence in the locality as a home; (2) the intention not to sever the relation unless something unforeseen should occur; and (3) the idea that the person is a foreigner (*peregrinus*) in any other locality in which he may have temporarily fixed his abode.

Domicile defined by its legal relations.

4. It has been observed by high authorities that no perfect definition is or can be given of a domicile; and this is true in the sense that we cannot, within the compass of a definition, embrace the whole of the decided law on the subject. Domicile may, however, be defined by its consequences, as denoting the relation which the person has to the locality by the law of which his status and the distribution of his personal estate are determined.[2]

By what Court to be determined.

5. The right of determining the national domicile of a deceased person belongs properly to the courts of the country in which the principal part of his personal estate is situated; for it is to the

passages in the Pandects which treat specially of this subject—namely, Dig. lib. 5, tit. 1 (De judiciis, et ubi quisque agere vel convenire debeat); lib. 50, tit. 1 (Ad municipalem, et de incolis); and Cod. lib. 10, tit. 39 (De incolis, et ubi quis domicilium habere videtur, et his qui studiorum causa in aliena civitate degunt). Among modern authorities reference may be made to Pothier, Pand. *in loc. cit.*, and Introd. aux Coutumes (ed. Dupin, vol. x. p. 1); Burge and Story, *ut supra;* Savigny, Tr. de Droit Romain, §§ 350-359, and specially §§ 358-9; Phillimore on International Law, vol. iv. chap. 3-14; Fœlix and Demangeat, vol. i. p. 54, and passages noted in index, *voce* Domicile; Bar, Intern. Recht, *voce* Domicile, and passages noted in index; Williams on Executors, 8th ed., 1523; Jarman on Wills, vol. i. chap. 1; Fraser, Pers. and Dom. Rel., vol. i. p. 716.

[1] Cod. lib. 10, tit. 39 (De Incolis, &c.), l. 7.

[2] "Domicile," said Lord Cranworth in *Whicker* v. *Hume*, "meant permanent home, and if that was not understood by itself, no illustration would help to make it intelligible;" 28 L.J. Ch. 400.

courts of that country that resort must be had by those who claim the inheritance. Incidentally the question may be raised in many ways in the lifetime of the party, *e.g.*, when an action is brought against him in the courts of his supposed domicile, jurisdiction being founded *ratione domicilii*.[1]

Place where last resident, whether presumed a domicile.

6. As residence is the basis of domicile, it follows that the place where an individual was "commorant," or habitually resident, at the time of his death, shall, in the absence of any contention to the contrary, be presumed to be his domicile for purposes connected with the administration of his succession.[2] On this principle, the Commissary Courts grant confirmations to the next of kin of all intestates resident in Scotland at the time of death, where no competing claim is made by persons claiming the character of personal representatives under the law of another domicile. But this is only a rule of administration, and where the fact of domicile is brought into controversy, there is no presumption in favour of the last place of residence. The fundamental point is the ascertainment of the "origin" of the person whose domicile is in question, and the onus of proof is on the party seeking to displace that domicile, and to establish a domicile of choice.[3] The domicile of origin, being admitted or ascertained, becomes the presumed domicile through life, until it is displaced by proof of an acquired domicile more proximate to the period to which the investigation is directed.[4]

Only one proper domicile.

7. Notwithstanding some doubtful expressions in the text of the Civil Law, it is now a generally received opinion that a person can have only one true domicile at one and the same time,[5] though, for the purpose of founding jurisdiction against him to certain effects, he may be considered as domiciled wherever he has a proper residence.[6] Where a person divides his time and his occupations between two places of residence, in such a way that no sufficient grounds can be found for assigning a preference to

[1] See Ersk. 1, 2, 16.

[2] *Bruce v. Bruce*, 15 April 1790, 3 Pat. 163, per Lord Thurlow. "A person being at a place is *prima facie* evidence that he is domiciled at that place ; and it lies on those who say otherwise to rebut that evidence" (p. 168) ; *Bempde* v. *Johnstone*, 3 Ves. 198 ; Voet, in Pand. 5, 1, 99.

[3] *Kennedy* v. *Bell*, 6 M. (H.L.) 69, reversing 22 D. 269 ; *Udny* v. *Udny*, 7 M. (H.L.) 89 ; *Vincent* v. *Earl of Buchan*, 19 Mar. 1889, 16 R. 637.

[4] "Every person born in wedlock acquires by birth the domicile of his father. . . It is evidently, therefore, more logical to commence an investigation of a man's domicile from a certain origin, namely, his domicile at birth, than from an accidental circumstance such as his place of residence at his death ;" per Wood, V.-C., in *Forbes* v. *Forbes*, 23 L.J. Ch. 724, 726.

[5] Among innumerable judicial *dicta* to this effect, reference is made to the opinion of the Judges of the Court of Session in *Lashley* v. *Hog*, reported in 4 Pat. 586, and of Lord Alvanley, M.R., in *Somerville* v. *Somerville*, 5 Ves. 786, the earliest authorities in the jurisprudence of the United Kingdom. See *Udny* v. *Udny*, *supra*, per Lord Chancellor.

[6] Ersk. 1, 2, 16.

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either, that place is to be held his domicile to which he first resorted *animo manendi;* but if no assignable distinction can be found either in the commencement of the residences, or in their quality or duration, it would seem that resort must be had, from the necessity of the case, to the law of the *situs* of the succession, and that in each domicile the court of distribution will divide the personal estate situated within its territories according to the law of intestate succession prevailing in its territory.[1]

Effect of residence in States not belonging to the European community.

8. The authorities upon the subject of the acquisition of a domicile by residence have relation exclusively to residence in the States of Europe and America, or their dependencies, nor are we aware that it has even been suggested that a subject of a European State could, by residence, become domiciled in a territory not belonging to the community of civilised States; so that his status and succession should be governed, for example, by the Mahommedan or any other system of law not recognised by the *jus gentium.*[2] British subjects resident within the Ottoman Empire have the privilege of the *statuta personalia* secured to them by treaty, the law of England being administered in the Consular Court; and similar privileges, it is understood, have been conceded to other Christian States.

Regulation of domicile by convention.

9. By the Act 24 and 25 Vict., cap. 121,[3] provision is made for the regulation of domicile by convention with such foreign States as may be willing to treat with reference to this subject. The object of its provisions is to prevent a British subject from acquiring a foreign domicile until he shall have resided in the foreign territory *for one year* immediately preceding his death,—with a reciprocal qualification in relation to foreigners dying in Her Majesty's dominions. In the existing state of the case law, that object has been very effectually accomplished independently of treaty or legislation.[4]

SECTION II.

Domicile of Origin.

Origo determined by father's domicile.

10. That domicile which a person derives from his parents at birth was termed by the civilians *origo*, and by modern jurists is

[1] Per Lord Alvanley in *Somerville's* case, 5 Ves. 791. Savigny in this case decides in favour of the place of decease in relation to questions of succession, § 359, ed. Fr. tom. 8, p. 107.

[2] See observations per Lord Pr. Inglis in *Steel* v. *Steel*, 15 R. 909.

[3] §§ 1-3.

[4] The provisions of the Code Civile, according to which French subjects are permitted to declare their domiciles by public act, seem to be worthy of adoption. Such declaration is declared by the Code to be conclusive evidence of the existence of the intention of the person. See the whole provisions on this subject in Arts. 102-10, and Mr. Burge's observations, vol. i. pp. 55-6.

denominated domicile of origin.[1] It is in no sense identified with the place of birth,[2] but is, in fact, identical with the domicile of the father, being derived from him as the head of the family. For, as domicile in its primary and natural signification is nothing more than the home or proper residence of the individual, it is evident that an infant can have no domicile distinct from that of its parents; and, for this purpose, the domicile of the father must be looked to, as it is his intention that fixes the character of the residence of the wife and family. Therefore, when a person is born in a foreign country, or at sea, being born in wedlock, his domicile is determined by that of his father.[3] Illegitimate children follow the domicile of the mother.[4]

Who are natural-born subjects.

11. By statute law, the children of British parents,[5] or of a father[6] who is a natural-born subject, though born out of the allegiance of the Crown, are declared to be natural-born subjects. The privilege extends to the children of persons naturalised by the operation of these Acts.[7] And by an Act of the present reign every person born out of Her Majesty's dominions, of a mother being a natural-born subject of the United Kingdom, acquires for himself and his heirs the right of taking any estate, real or personal, by devise or purchase, or inheritance of succession.[8]

Domicile during the age of minority.

12. For the same reason that an infant does not obtain a domicile distinct from that of his parents by the accident of birth, he cannot acquire an independent domicile during the period of nonage. "I have no difficulty," said Lord Alvanley, "in laying down that no domicile can be acquired until the person is *sui juris*."[9] And in the leading case of *Forbes* v. *Forbes*, Vice-Chancellor Wood states it as an elementary proposition, that the domicile

[1] "Le forum originis des Romains, dans sa signification primitive, n'existe plus pour nous," Savigny, § 358, ed. Fr. p. 93. For an explanation of the legal relation denoted by the term *origo* among the Romans, see the same work, § 351 *et seq.*

[2] *Wylie* v. *Laye*, 11 July 1834, 12 Sh. 927.

[3] Cod. lib. 10, tit. 31, l. 36. "Patris originem unusquisque sequatur," &c. "Les Romains appellent *origo* le droit de cité acquis á un individu par la naissance. Nous appellons *origo* le domicile fictif attribué à un individu dans le lieu où a l'epoque de sa naissance son père était domicilié;" Savigny, § 359, ed. Fr. p. 105.

[4] 1 Burge, p. 33; Savigny, ed. Fr. p. 65; *Heritors of Lasswade* v. *St Cuthberts*, 6 Mar. 1844, 6 D. 956. "Pour les enfants trouvés on peut regarder comme domicile le lieu où ils ont été recueillis, sauf à lui substituer le lieu où on les enverrait résider pour faire leur éducation, soit dans un établissement public, soit chez des particuliers." Savigny, *in loc. cit.*, ed. Fr. p. 107.

[5] 7 Anne, cap. 5.

[6] 4 Geo. II., cap. 21, § 1.

[7] *Doe* v. *Jones*, 4 Term. Rep. 300.

[8] 7 and 8 Vict., cap. 66, § 3. By the same statute it is provided that any woman married, or who shall be married, to a natural-born subject, or person naturalised, shall be deemed and taken to be herself naturalised, and have all the rights and privileges of a natural-born subject (§ 16).

[9] *Somerville* v. *Somerville*, 5 Ves. 787. Voet, lib. 5, tit. 1, § 100; 1 Burge, 38.

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of an infant cannot be changed by his own act.[1] But these observations must be confined to the case of persons absolutely *alieni juris;* for it is not doubted that, under the systems of law which recognise the distinction of pupilarity and minority, a minor beyond the age of pupilarity has the capacity of acquiring a domicile for himself.[2] During the period of pupilarity, or even of minority if the minor continue to live with his father, or to be supported by him, he may lose his original domicile and acquire another, derivatively, through his father;[3] and it has been questioned whether a domicile so acquired in minority should not be regarded as *origo* in a question as to the revival of the domicile of origin consequent on death *in itinere*.[4]

Whether changed by act of the surviving parent.

13. A widow, after the death of her husband, has the capacity of acquiring a domicile by her own act; and it was held by Sir W. Grant, after elaborate argument, that minor children followed the domicile of the surviving mother, if the change of domicile were not made with a fraudulent intention.[5] But it does not seem to be agreeable to reason or good policy that the marriage of a widow with a foreigner should have the effect of changing the domicile of the children of her deceased husband.[6]

Origo not easily lost.

14. The judicial opinions in the earlier cases show an appreciation of the difficulty of establishing the fact of the acquisition of a new domicile, and the caution to be observed in drawing the inference that a person had intended to abandon his domicile of birth.[7] But the principle of the persistence of the domicile of origin may be said to have received its final and decisive illustration from the later decisions of the House of Lords, and especially from the cases of *Bell* and *Udny*. The judgments delivered in the latter case by Earl Cairns, and Lords Hatherley and Westbury, will repay a careful study. The last-mentioned judge thus expresses the sum of all the learning on this subject: "It is a settled principle," says Lord Westbury, "that no man shall be without a domicile; and to secure this result the law attributes to every individual, as soon

[1] *Forbes* v. *Forbes*, 23 L.J. Ch. 727.

[2] *Arnott* v. *Stewart*, 24 Nov. 1846, 9 D. 142.

[3] *Per curiam* in *Wylie* v. *Laye*, 12 Sh. 928.

[4] As to the doctrine, see § 15, *infra*.

[5] *Potinger* v. *Wightman*, 3 Mer. 79. See the opinions of the judges in *Arnott* v. *Stewart*, 24 Nov. 1846, 9 D. 142, to this effect; and particularly the observations of the Lord President, p. 147.

[6] Voet, lib. 5, tit. 1, § 100; 1 Burge, 39, citing *Scrimshire* v. *Scrimshire*, 2 Hag. Cons. Rep. 406.

[7] See *Colville* v. *Lauder*, 1800, M. "Succession," App. No. 1; *Macdonald* v. *Laing*, 1794, M. 4627, and the English case of *Somerville*, where it was laid down by Lord Alvanley, M.R., that the domicile of origin is to prevail "until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile" (5 Ves. 787).

as he is born, the domicile of the father if the child be legitimate, or the domicile of the mother if illegitimate. This has been called the domicile of origin, and it is involuntary. Other domiciles are domiciles of choice, for as soon as the individual is *sui juris*, it is competent to him to elect and assume another domicile, the continuance of which depends on his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile. But as the domicile of origin is the creation of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being, by the mere act of the party, entirely obliterated and extinguished. It revives and exists whenever there is no other domicile; and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a new domicile of choice."[1]

Revival of domicile of origin by death *in itinere*.

15. It has at all times been acknowledged that the native character easily reverts; and therefore, where the intention to revive the native domicile is established, the briefest residence will be sufficient to satisfy the requirement of actual commorancy in fulfilment of the intention.[2] But mere intention to resume the native character will not suffice if the person continue his residence in the acquired domicile;[3] there must be actual abandonment of the acquired domicile, as well as the establishment of a home in the original domicile.[4] The favour shown to the domicile of origin led to the recognition of the doctrine, that where a person finally abandons an acquired domicile, with the intention of establishing himself in his native country, the domicile of origin revives, if he dies *in itinere*.[5] If a person dies while *in transitu* to *a new*

[1] 7 M. (H.L.) at p. 99. The judgment accordingly contained a declaration that if Colonel Udny's "domicile of origin was ever changed, yet by leaving England in 1844 his domicile of origin *reverted*." Note also in the opinions of Lord Hatherley (p. 96) and of Lord Westbury the distinction of civil from political status, in correction of Lord Kingsdown's *dictum* in *Moorhouse* v. *Lord*. See also *Bell* v. *Kennedy*, May 14, 1868, 6 M. (H.L.) 69.

[2] "The native character easily reverts; and it requires fewer circumstances to constitute domicile, in the case of a native subject, than to impress the national character on one who was originally of another character,"—per Lord Stowell, in *La Virginie*, 5 Rob. Ad. Ca. 99; and see *Lashley* v. *Hog*, 12 July 1804, 4 Pat. 581, 621.

[3] *Adv.-Gen.* v. *Lamont*, 29 May 1857, 19 D. 779, 783; *Bruce* v. *Bruce*, 15 April 1790, 3 Pat. 168,—where Lord Thurlow observed, with reference to the case of an Indian officer preparing to return to Scotland, "He meant to return to his native country, it is said, and let it be granted; he then meant to change his domicile, but he died before actually changing it."

[4] Per Sir H. Jenner Fust in *Craigie* v. *Lewin*, 3 Curt. 435, 445, cited by Lord Wensleydale in *Aikman* v. *Aikman*, 3 Macq. 879-80. Burge, vol. i. p. 34, and authorities there cited.

[5] Story, Confl. § 47; Burge, Com. vol. i. p. 34; 1 Fraser, p. 723, and cases cited in the next note.

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country, with the intention of making it his domicile, it does not become so, and it was much discussed whether, in such a case, he should be held to have retained his last acquired domicile, or whether resort should be had to the *domicilium originis*.[1] The case of *Udny* may be held as settling the question in favour of the domicile of origin. In fact the case of a homeward bound traveller dying *in itinere* is only an example of the principle of the persistence of the domicile of origin, a *status* which is capable of being suspended during pleasure, but can only be extinguished by death.

SECTION III.

Domicile of Choice.

Elements in the acquisition of a domicile—intention and residence.

16. The chief difficulty incident to the determination of questions of domicile consists in the absence of any presumptions, or other criteria, from which the intention to change, which is the main element in such cases, may be inferred. Every case resolves into a question of evidence, to be determined according to the impression produced by the facts upon the mind of the judge; little reliance therefore can be placed on precedents. The only proposition as to which jurists are agreed is, that in order to effect a change of domicile there must be, first, actual residence within the territory; and, secondly, an intention to change the domicile, or to adopt the new country as the principal and permanent place of abode. To constitute a domicile no definite term of residence is required; but the duration of the residence is, of course, an important element in the question of permanency of residence. "Of the few principles," said Lord Stowell,[2] "that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile." And a domicile is not to be established by evidence of intention, however strong, if the person did not actually fix his residence in the intended domicile. The statements of the person whose domicile is in question are admissible in proof of intention; and, where the question arises in his lifetime, he may be examined as a witness; such evidence is open to the observation that it is the statement of a party interested on a matter of impression or opinion, rather than of past fact.[3] Letters and spoken declarations

[1] Lord Cottenham states, as the doctrine of the civil law, that in this case the domicile of origin revives; *Munro* v. *Munro*, 1 Rob. 606. A similar opinion was expressed by Sir John Leach, V.-C., in *Munroe* v. *Douglas*, 5 Madd. 379, 405. The question was elaborately discussed in *Lyall* v. *Paton*, 25 L.J. Ch. 746; but the circumstances of the case did not admit of a decision being given on the point.

[2] *The Harmony*, 2 Rob. Ad. Rep. 324. And see the observations of Kindersley, V.-C., in *Cockrell* v. *Cockrell*, 25 L.J. Ch. 732.

[3] *Maxwell* v. *M'Clure*, 18 Dec. 1857,

made at the time are often valuable *indicia* from which an intention to abandon an old domicile, or to acquire a new one, may be inferred.[1] Actual residence is not indispensable to the retention of a domicile after it is acquired; but the status is retained, *animo solo*, by the mere intention not to change it, or to adopt another.[2]

Effect of a change of motive.

17. It is to be observed that the native domicile is presumed to be continued until a new one has been acquired *animo et facto*, and the abandonment of the domicile of origin is not necessarily coincident in time with the settlement in the new residence. A residence originally dictated by considerations of convenience or taste, and without a view to permanence, may afterwards be adopted as a proper domicile; and where this is so, the motive of choice in the first instance becomes unimportant.[3]

Distinction of motives determining residence.

18. As a general rule, however, the motive of residence is, of all the *indicia* of intention, that which is most anxiously sought and most keenly criticised. Yet it is difficult to deduce from the decisions any sound canon of criticism applicable to motives of residence, excepting this, that motives which are temporary in their nature tend to qualify the residence in a sense unfavourable to the acquisition of a domicile; while motives of an enduring character, and chiefly that indefinable but most influential motive of attachment to the country, or preference for its manners and society, are those from which an intention to adopt it as a domicile may most reasonably be inferred.

Temporary motives of residence.

19. Examples of change of residence due to temporary motives, and not implying an intention to alter the domicile, are the cases of resort to a milder climate for the preservation or restoration of health;[4] to a university town for study; and to a

20 D. 307; *Kennedy* v. *Bell*, 1 Macph. 1127, 6 M. (H.L.) 69; *Udny* v. *Udny*, 7 M. (H.L.) 89. In the two cases last cited the Law Lords, while giving credit to the parole evidence of the party, relied more on the contemporaneous evidence of his intentions and views of life found in correspondence with friends.

[1] See, among many other cases, the cases of *Aikman* v. *Aikman*, 21 D. 757, 3 Macq. 854; *Lowndes* v. *Douglas*, 24 D. 1391; *Kennedy* v. *Bell*, *ut supra*; and *Udny* v. *Udny*, *ut supra*; and, on appeal from the Court of Chancery, *Moorhouse* v. *Lord*, 32 L.J. Ch. 295. In a previous case it was observed by Kindersley, V.-C., that in most cases the evidence as to the deceased's declarations of intention was conflicting,—as it was in that case, where there was evidence of the testator saying he meant some day or other to go back to France; and, on the other hand, evidence of his saying he meant to remain all his life in England. He (the V.-C.) thought that, upon the cases, the Courts were disposed to give less weight to that sort of declaration than to the acts of the deceased; *Drevon* v. *Drevon*, 34 L.J. Ch. 131.

[2] Story, Confl. § 44.

[3] "Residence is often of a very equivocal nature, and the intention as to that residence is often still more obscure. An intention of permanent residence may often be ingrafted upon an inhabitancy originally taken for a special or a fugitive purpose;" Story, Confl. § 45.

[4] Story, Confl. § 44; 1 Fraser, Pers. and Dom. Rel. 719; *Macdonald* v. *Laing*, 1794, M. 4627; *Lowndes* v. *Douglas*, 18

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residence chosen on account of the advantages it offers for the education of children.[1] The authorities are clear and consistent to the effect that a domicile cannot be acquired by residence for such causes, notwithstanding that it may have had a considerable duration, and may have been continued to the period of death. Nor will a constrained residence abroad—*e.g.*, by a prisoner on parole;[2] or by an Englishman staying in the Highlands of Scotland, or at Boulogne, to be out of the way of creditors,[3] take effect on the domicile.

Connection with native country maintained.

20. The facility of travelling, and the increasing intercourse with all parts of the world in modern times, lead many of our countrymen, especially those possessed of independent fortunes, to spend a great part of their time in foreign countries. The case of a traveller, varying his residence from year to year, presents no difficulty; in his case there is clearly no abandonment of the native domicile. But if we put the case of a Scotsman fixing his residence in London or in Paris, without any motive of business or necessity, but merely on the ground of convenience or preference for town life: this is evidently a case of difficulty, as it is one of frequent occurrence. The cases of *Aikman*,[4] *Udny*,[5] and *Moorhouse* v. *Lord*[6] are, it is conceived, conclusive of the proposition that in such a case the person does not lose his domicile if he maintains his connection with the parent country. And it is a sufficient connection that he has an estate or a residence in the country of his domicile, and visits it once a year, or at regular intervals, transacting such business, if any, as his circumstances and station require.[7] While the mere fact of possession of patrimonial estate in Scotland

July 1862, 24 D. 1391; *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42, per Lord Campbell; *Moorhouse* v. *Lord* (on appeal), 32 L.J. Ch. 295, where Lord Kingsdown observed:—"A man might leave England with no intention of returning, nay, with a determination never to return—*e.g.*, a man labouring under mortal disease, and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject—without losing the right to the intervention of the English law in the transmission of his property after his death, and in the construction of his testamentary instruments? Such a proposition was revolting to common sense" (p. 299).

[1] Cod. lib. 10, tit. 39, l. 2: "Nec ipsi, qui studiorum causa," &c. *Moorhouse* v. *Lord*, *supra*. Here the original motive of the foreign residence was connected with the education of the testator's children; but the residence was prolonged apparently without any very special reason, and the testator died in France; it was held that he had not lost his national domicile, which was in Scotland.

[2] Story, Confl. § 47, and authorities there cited; 1 Burge, 46.

[3] *Pitt* v. *Pitt*, 6 April 1864, 4 Macq. 627; *Udny* v. *Udny*, 7 M. (H.L.) 89; *Bruce* v. *Hamilton*, 1804, H. 762.

[4] *Aikman* v. *Aikman*, 21 D. 757; 12 March 1861, 3 Macq. 854.

[5] *Udny* v. *Udny*, 5 Macph. 164, 7 M. (H.L.) 89.

[6] *Moorhouse* v. *Lord*, 19 March 1863, 32 L.J. Ch. 295.

[7] Cases of *Aikman* and *Udny*, *supra*.

is not sufficient to prevent the acquisition of a foreign domicile by residence,[1] yet it would seem, on the authority of the above-mentioned cases, that the abandonment of the native domicile will not readily be presumed in the case of a landed proprietor, and that slighter circumstances will be admitted to establish an intention of retaining it than would be required in the case of a person who had no local connection with the soil.

Residence determined by preference, with abandonment of native country.

21. Where the evidence establishes a residence in a foreign capital, with the ordinary attributes of permanence, and without the countervailing element of connection with the national domicile by proprietorship and periodical visits, or other equivalent indications of intention, it would appear that this amounts to a change of domicile.[2] It is not necessary for this purpose that the person should be naturalised in the foreign country, or that he should renounce his allegiance.[3] It has, indeed, been asserted by jurists that a domicile is not acquired by residence *voluptatis causa;* and this is an observation properly applicable to transitory residences for recreation or amusement, as well as to those cases where the continuance of the residence is consequent upon habits or connections of a less reputable character, and which are not publicly avowed.[4] But where, on the ground of preference for foreign manners and society, or to be with friends or relations, or from similar motives, a person of independent means fixes his residence in a foreign city, we may hold that in such circumstances a foreign domicile is acquired, although the nationality of the person is not altered.[5]

Residence of persons in business, and in public employments.

22. According to the doctrine of the Civil Law, a foreign domicile is acquired by cultivating a farm, or engaging in the prosecution of a business or profession in the colony or foreign place of residence,—which thus becomes the seat of the fortune and affairs of the colonist.[6] With reference to employment in the service

[1] The *Dree Gebræders*, 4 Rob. Ad. Rep. 235, per Lord Stowell; *Rose* v. *Ross*, 16 July 1830, 4 W. & S. 289; *Forbes* v. *Forbes*, 23 L.J. Ch. 724.

[2] *Forbes* v. *Forbes*, 23 L.J. Ch. 724.

[3] *Udny* v. *Udny*, *supra*.

[4] See the circumstances explanatory of the London residence in *Aikman* v. *Aikman*, and the comments of the judges, 21 D. 767, and 3 Macq. 855.

[5] *President of U.S.* v. *Drummond*, 33 L.J. Ch. 501; but see the circumstances which were held not to constitute a foreign domicile *in re Capdevielle*, 33 L.J. Ex. 306, and *Att.-Gen.* v. *Count Blucher*, 34 L.J. Ex. 29. If these decisions of the Court of Exchequer be sound, we do not see how it is possible that a change of domicile can be effected except by naturalisation in solemn form.

[6] *Att.-Gen.* v. *Lamont*, 29 May 1857, 19 D. 779; *Lowndes* v. *Douglas*, 18 July 1862, 24 D. 1391; *Cockrell* v. *Cockrell*, 25 L.J. Ch. 730; *Allardyce* v. *Onslow*, 33 L.J. Ch. 434. But the character of the business may be important, *e.g.*, if the party were engaged in conducting the foreign business of an English or Scotch mercantile house the same inference might not follow. See *Steel* v. *Steel*, 15

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of the Government, a distinction is taken between local appointments and those which do not connect the *employé* with any particular locality. Residence on foreign service does not affect the domicile of officers in the army or navy,[1] or of ambassadors,[2] nor, as we apprehend, of consular agents, without local connections and eligible for promotion in the service.[3] Governors of colonies,[4] of military stations,[5] and other local functionaries of the British dependencies, acquire the domicile of the station to which they are attached.[6]

Anglo-Indian domicile.

23. British subjects entering the Indian civil or military services of the East India Company, or the Crown, acquired an Anglo-Indian domicile, on the principle that their official duties bound them to a residence of such an exclusive and permanent character as was inconsistent with the retention of a domicile in the mother country.[7] And the acceptance of a permanent appointment under a foreign government (not including, however, a consulship in one's own country) is tantamount to the adoption of a foreign domicile.[8]

Intention to change in case of going to a colony.

24. In observing upon the recent English decisions, the editor of Story's Conflict of Laws draws a distinction between change of *national domicile* (which, according to the cases, is tantamount to expatriation) and change of domicile by removing to a colony, or "from one place to another in the same state, province, or kingdom," in which case the intention to change the domicile may be inferred on slighter *indicia*, and notwithstanding the existence of an indefinite or floating intention of returning.[9] The observations of Lords Cranworth and Kingsdown in *Moorhouse* v. *Lord*,[10] if they

R. 909, per L. Pr. Inglis, and *Moorhouse* v. *Lord*; *Jopp* v. *Wood*, 34 L.J. Ch. 212, where residence from 1805 to 1830 in India, as a merchant and planter, was held not to give an Indian domicile, the deceased having in his letters expressed the intention of returning to Great Britain.

[1] And a domicile in one part of the United Kingdom is not altered by military service in another part; *re Patten*, 6 Jur., N.S. 151; *Yelverton* v. *Yelverton*, 29 L.J. Matr. 34. But the fact that a person holding a colonial appointment is an officer in the British service, and is obliged, in order to retain his pay, to obtain, and from time to time to renew, his leave of absence, does not prevent the acquisition of a foreign domicile; *Clarke* v. *Newmarsh*, 13 Feb. 1836, 14 Sh. 488; *Cockrell* v. *Cockrell*, 25 L.J. Ch. 730.

[2] Story, Confl. § 48, and authorities there cited.

[3] *Udny* v. *Udny*, 14 Dec. 1866, 5 M. 164; 7 M. (H.L.) 89.

[4] *Comrs. of Inland Revenue* v. *Gordon's Exrs.*, 2 Feb. 1850, 12 D. 657.

[5] *Clarke* v. *Newmarsh*, *supra*.

[6] See Mr. Burge's elaborate analysis of the authorities on this class of cases, vol. i. pp. 47-53.

[7] *Bruce* v. *Bruce*, 15 April 1790, 3 Pat. 163; 21 Nov. 1804, Hume, 762; compare *Hook* v. *Hook*, 24 D. 488. English cases of *Bruce* v. *Bruce*, 2 B. & P. 229; *Forbes* v. *Forbes*, 23 L.J. Ch. 724; and *Moorhouse* v. *Lord*, 32 L.J. Ch. 295. As to Anglo-Indian domicile and the effect of the Indian Succession Acts, see *Wauchope* v. *Wauchope*, 23 June 1877, 4 R. 945; also *Steel* v. *Steel*, 15 R. 909, per L. Pr. Inglis.

[8] Per Lord Campbell in *Aikman* v. *Aikman*, 3 Macq. 856.

[9] Story, Confl. § 49 (*c*).

[10] *E.g.*, that to change "the domicile"

are still to be considered as authoritative, can only apply to cases of alleged acquisition of a strictly foreign domicile.[1]

Double residence—English or Scotch.

25. Questions as to English or Scottish domicile present another element of difficulty, that of double residence. In this class of cases the Court has to ascertain which is the principal residence, taking all the circumstances into view. In the case of *Warrender*, the domicile was held to be in Scotland, where the pursuer had his estate and country seat, rather than in England, where he resided during the sitting of Parliament of which he was a member.[2] In *Forbes* v. *Forbes*, the London residence was held to fix the domicile, because that was the residence of General Forbes' wife, and there only he kept an establishment suited to his rank and fortune.[3] In such cases considerable weight is given to the domicile of origin.[4] In the absence of such indications, the place where a residence has been first acquired is generally to be regarded as the domicile.[5] A correct appreciation of the considerations on which questions of double residence are determined, can only be obtained by an attentive study of all the cases bearing on the subject.[6]

SECTION IV.

Wife's Derivative Domicile.

Principle of wife's derivative domicile.

26. The doctrine by which the domicile of a married woman

a man must intend "to become a Frenchman instead of an Englishman" (32 L.J. Ch. pp. 298-9). The same observation applies to Dr. Lushington's judgment in *Hodgson* v. *De Beauchesne*, 12 Moo. P.C. Ca. 825. And see these commented on in *Bell* v. *Kennedy* and *Udny* v. *Udny* on appeal, *ut supra*.

[1] Compare *Purvis' Trs.* v. *Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812, where the residence was foreign, *i.e.*, in the Netherlands-India, and the Scottish domicile was held to be retained, with *Lowndes* v. *Douglas*, 24 D. 1391, and *Kennedy* v. *Bell*, 1 M. 1127, 6 M. (H.L.) 69, where the residence was in the British West Indies, and in both cases a colonial domicile was held to have been acquired.

[2] *Warrender* v. *Warrender*, 27 Aug. 1835, 2 S. & M'L. 154.

[3] *Forbes* v. *Forbes*, 23 L.J. Ch. 724; *Lauenville* v. *Anderson*, 9 Moo. P.C. Ca. 325.

[4] *Munro* v. *Munro*, 10 Aug. 1840, 1 Rob. 492; *Aikman* v. *Aikman*, 12 Mar. 1861, 3 Macq. 854; *Lashley* v. *Hog*, 4 Pat. 581, see p. 621; *Campbell* v. *Campbell*, 9 Jan. 1861, 23 D. 256. According to Burge, vol. i. p. 45, it is an important circumstance only as it is so in the estimation of the party himself.

[5] *Maxwell* v. *M'Clure*, 20 D. 307; 3 Macq. 852.

[6] See, in addition to the preceding cases, *Ommanney* v. *Bingham*, 15 March 1796, 3 Pat. 448; *Somerville* v. *Lord Somerville*, 5 Ves. 749. Mr Burge makes an important deduction from the last cited case:—"In the absence of any circumstances which give to the residence in another place than that of the domicile of origin a predominant character of permanence, if a cause can be assigned for an establishment in the former, whilst none can be assigned for keeping it up in the place of his domicile of origin but the desire and intention to retain that domicile, the domicile of origin must prevail." (Vol. i. p. 46.)

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is identified with that of her husband is founded on the same considerations which have led to the recognition of derivative domicile in the case of minor children. Identity of domicile is inferred from the obligation incumbent on the wife to live in family with her husband and to follow his fortunes; it may cease to hold under circumstances which release her from that obligation.[1]

Doctrine of "matrimonial domicile" examined.

27. The term "matrimonial domicile," which is sometimes used to describe the true domicile of a married woman, seems objectionable on the ground of ambiguity. It has been defined to be the domicile contemplated by the parties at the time of entering into the married relation. But, in contemplation of law, marriage is not contracted with reference to residence in any particular locality, and it is conceivable that the parties may never actually resort to the country which at the celebration of the marriage it was their intention to choose for their place of abode. If the husband had not actually fixed his residence in the place contemplated, the supposition that, in respect of mere intention, the parties should be held to be domiciled in a locality where they are not in fact domiciled, is inconsistent with principle.[2] Again, if the intention entertained at the time of the marriage is carried out, and the husband fixes his domicile in accordance with it, then it is evident that the wife's domicile is determined solely by the will of the husband after marriage, and is not dependent on any antecedent agreement. It may well be that where a contract of marriage is executed having relation to the rights of the spouses as determined by the law of the country where it is intended that the spouses shall reside, the construction of the contract shall be regulated by the law of the intended domicile. It may also be that the consistorial courts of the intended matrimonial domicile have jurisdiction to dissolve the marriage, or to grant relief for breach of its engagements.[3] But these are cases of forensic domicile depending on equitable considerations, and subsisting for special

[1] "Mulieres honore maritorum erigimus, genere nobilitamus, et forum ex eorum persona statuimus: et domicilium mutamus;" Cod. lib. 10, tit. 39, l. 9.

[2] "The change by the husband of his domicile, either of origin or of that which was his domicile at the time of his marriage, will necessarily operate as a change of that of the wife; and, indeed, it has been said that a contract by the husband that he would not change his domicile without the consent of his wife was void; but there is no reason why it may not be made the subject of a special contract that the wife should not be prejudiced in her rights by a change of the husband's domicile;" 1 Burge, 40.

[3] See the observation of the late Lord President on this subject in *Stavert* v. *Stavert*, 3 Feb. 1882, 9 R. 519. As to the circumstances which create consistorial jurisdiction in Scotland *ratione domicilii*, see *Jack* v. *Jack*, 7 Feb. 1862, 24 D. 467; *Hook* v. *Hook*, *eo die*, 24 D. 488; *Hume* v. *Hume*, 15 July 1862, 24 D. 1342; and, on appeal, *Pitt* v. *Pitt*, 6 April 1864, 4 Macq. 627, which practically negatives the theory of a forensic, as distinct from a true, domicile.

purposes only. There can be no general matrimonial domicile except the domicile which the husband acquires by residence in a definite locality, with the intention of fixing his domicile there.[1]

Warrender v. *Warrender.*

28. The leading case on the doctrine of the wife's derivative domicile is that of *Warrender* v. *Warrender*,[2] decided by Lord Brougham on appeal. But except as an exposition of the general rule, which had long been settled in practice, and is distinctly laid down by Lord Stair,[3] this decision did little or nothing to advance the principles of this department of the law. In so far as it inculcates the doctrine that the wife is subject to the Courts of Scotland in respect of the husband's temporary residence, it has been formally overruled,[4] and it throws no light on the question whether the husband can arbitrarily change the wife's domicile for forensic purposes.[5]

Effects of dissolution of marriage, and of separation.

29. On the dissolution of the marriage by death or divorce, the identity of domicile is destroyed, and the domicile of the parties, or the survivor of them, is no longer governed by the rule of law referred to.[6] It may be regarded as a settled point that a married woman does not by means of a voluntary deed of separation acquire the capacity of fixing her domicile.[7] On principle it would seem that a judicial separation ought to give this capacity, inasmuch as it destroys the *consortium vitæ* on which the notion of derivative domicile is founded; and there are *dicta* in favour of this view.[8] But Lord Kingsdown, a great authority on such questions, stated that he considered the question to be entirely open.[9]

[1] In *Arnott* v. *Stewart*, 24 Nov. 1846, 9 D. 142, the circumstance that a lady, previously domiciled in Scotland, was at the time of her death under engagement to be married to an Englishman, was held to be of no materiality in a question as to her domicile of succession. In *Lashley* v. *Hog* it was laid down (4 Pat. 615) that the place where a marriage was celebrated afforded no presumption as to the future domicile of the spouses.

[2] *Warrender* v. *Warrender*, 27 Aug. 1835, 2 S. & M'L. 154.

[3] Stair, 1, 4, 9.

[4] First by the Court of Session, in *Ringer* v. *Churchill*, 15 Jan. 1840, 2 D. 307, and ultimately by the House of Lords itself, in *Pitt* v. *Pitt*, *ut supra*.

[5] On this point see the observations of the Law Lords in *Dolphin* v. *Robins*, 3 Macq. 579 *et seq.*; and in *Pitt* v. *Pitt*, 4 Macq. pp. 640 and 647.

[6] But the wife retains the domicile of her husband, even after the relationship is dissolved, until she makes choice of and establishes another domicile, or re-marries; 1 Burge, 35; Voet, 5, 1, 95.

[7] *Dolphin* v. *Robins*, 4 Aug. 1859, 3 Macq. 563, a unanimous judgment. And see Lord Brougham's observations in *Warrender* v. *Warrender*, *ut supra*.

[8] *Allison* v. *Catley*, 15 June 1839, 1 D. 1025; *Dolphin* v. *Robins*, 3 Macq. 578, per Lord Cranworth.

[9] 3 Macq. 581.

CHAPTER II.

INTERNATIONAL LAW IN RELATION TO WILLS AND SUCCESSION.

1. Regulation of Succession in Intestacy.
2. Validity and Effect of Wills and Testamentary Writings.
3. Interpretation of Wills and Testamentary Writings.
4. Administration of the Succession.
5. Election.
6. Revenue Laws.
7. Jurisdiction and Forum Conveniens.
8. Ascertainment of Foreign Law.

Limits of the subject.

30. The law of succession, which is concerned with the distribution of a man's entire estate and the adjustment of the claims of his heirs and representatives, without distinction of locality or nationality, has many international relations, and involves in a greater degree than any other branch of private right the consideration of the question, What is the system of law governing the particular right or relation? In a work relating to the Scottish Law of Succession, it is proper that we should consider, in the outset, what are the relations of succession which the law of Scotland is competent to regulate.

31. The principles of private international law upon which our Courts proceed are assumed to be consistent with the doctrines of general jurisprudence. It must be remembered, however, that while those principles are supposed by jurists to be strictly obligatory, yet, as was observed by an eminent judge, no rule of law binding *proprio vigore* upon any independent state can be established by generalisation from the jurisprudence of other nations. In point of fact few, if any, such rules are universally accepted without some modifications or corrections, making it necessary to distinguish between the general principle and the forms and conditions of its local application. In this place, we are concerned with the applied international law of Scotland in relation to succession, as established by the decisions of its Courts, with such aid as can be derived from the judicial expositions and opinions of jurists of other countries.

Division of the subject of the chapter.

32. Without professing to make an exhaustive division of the subject, the questions which result from the relations of rights of

succession in Scotland with those of foreign countries may be classed under the following heads:—(1) Regulation of intestate succession; (2) validity and effect of testamentary dispositions (capacity of the granter—lawfulness of grant, and capacity of grantee—form of the instrument; (3) interpretation of testamentary dispositions; (4) title and administration of successions (*aditio hæreditatis*—responsibility of executors); (5) election; (6) revenue laws; (7) jurisdiction; (8) ascertainment of foreign law. There are other questions of international relation which may with advantage be reserved for consideration in connection with the departments of law to which they belong, and to the separate discussion of such subjects the reader is referred.[1]

SECTION I.

Regulation of Succession in Intestacy.

Moveable and immoveable succession.

33. With respect to intestate succession, the principles of international law are simple and of easy application. The succession to the moveable estate is governed by the law of the domicile of the intestate at the time of his decease; that of the immoveable estate (which, as regards estate situated in Scotland, is identical with heritable succession) is governed strictly by the *lex loci rei sitæ*.[2]

[1] By far the most comprehensive and the best exposition of the law of succession in its international relations is that given by the late Mr. Burge, in the fourth volume of his Commentaries on Colonial and Foreign Law. Among modern treatises, reference may also be made to Story's Conflict of Laws, chapters 11 and 12; Phillimore on International Law, vol. iv. chapter 43; Kames' Equity, book iii. ch. 8; Robertson on Personal Succession; Jarman on Wills, chapter 1; Savigny, Traité de Droit Romain, §§ 376-378; Fœlix and Demangeat, Droit International, 4éme ed., tom i. p. 260, § 115; De Chassat, Traité de Statuts, l. 1, tit. 3, ch. 1, and l. 1, tit. 4, ch. 6; Bar, Internationale Privat und Stafrecht, Abt. 3, § 6; see also Huber. ad Pand. i. 3, App. de Confl.; Voet ad Pand. i. 4, pars 2, de Statutis. Ample reference to the older literature will be found in the works of Burge and Story in the passages indicated in our notes, and it has been thought unnecessary to give references which might easily have been transcribed from the works of those authors, but which would not contribute in any way to the advancement of jurisprudence. Another reason may be given for this apparent inattention to the works of jurists, and it is one which those who are the most familiar with the older literature will best appreciate, namely, that the bearing of its discussions upon such practical questions as are here treated, is too indirect to admit of their being used in the manner of express authority for propositions.

[2] Savigny, whose opinion has been alluded to, maintains the general application of the *lex domicilii* to the whole succession without distinction; but to accommodate his principle to the actual state of international law, suggests that in those countries where the right of succession is based on the Civil Law doctrines of universal succession, the law of the domicile should be decisive for the entirety of the estate, while in countries such as England and America, where the principles of universal succession are not admitted, the succession of immoveables ought to be regulated by the *lex loci rei*

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The rule is applied in precisely the same way, whether its operation tends to subject the estate to the Scottish law of succession or to the law of a foreign country. "Where," says Erskine,[1] a Scotsman dies abroad *sine animo remanendi*, the legal succession of his moveable estate in Scotland must descend to his next of kin according to the law of Scotland; and where a foreigner dies in this country *sine animo remanendi*, the moveables which he brought with him hither ought to be regulated, not by the law of the territory in which they locally were, but by that of the proprietor's *patria* or domicile whence he came, and whither he intends again to return. This rule is founded in the law of nations; and the reason of it is the same in both cases." The early decisions are conflicting, the Court having in some of them assumed the *lex loci rei sitæ* to be the universal law of succession; but the law, as stated by Erskine, was established by the ultimate judgments in the cases of *Bruce* v. *Bruce*[2] and *Hog* v. *Lashley*.[3]

Questions as to (1) quality of estate; (2) propinquity.

34. The investigation of intestate succession in its international relations involves two collateral questions which are antecedent to the application of the municipal law of succession:—*First*, by what law is the moveable or immoveable quality of the subject to be determined? *secondly*, what law has cognisance of the propinquity of the person claiming the succession?

Quality of estate determined by *lex loci rei sitæ*.

35. (1) It is the function of the law of the *situs* to determine the proper character of a fund, *i.e.*, whether it is moveable or immoveable; and in the case of incorporeal subjects, such as stocks or mortgages, the country where the deed of security was granted, or where the debt or dividend is payable, is for this purpose to be deemed the *situs rei*.[4] Thus, by the application of the municipal law of Scotland, bonds secluding executors, as also money secured on heritable estate, were relegated to the class of immoveable subjects, and were deemed incapable of being transferred by testa-

sitæ; Droit Romain, § 376, tom. 8, p. 300; also § 377, tom. 8, p. 110. See Burge's Commentaries, vol. iv. p. 150 *et seq.*, where all the authorities are cited, and extracts given from the opinions of the jurists; Story, § 480 *et seq.* as to moveable succession, and § 484 *et seq.* as to immoveable; De Chassat, Traité de Statuts, p. 371 *et seq.*, who states very forcibly the reasons which justify the State in regulating the succession to the soil of its own territory, and in declining to recognise the law of the domicile; also Bar, Int. Recht, § 107, who discusses at great length the claims of the *lex domicilii* and the *lex loci rei sitæ*.

[1] Ersk. 3, 9, 4, citing *Broun* v. *Broun*, 1744, M. 4604.

[2] *Bruce* v. *Bruce*, 1788, M. 4617, 15 April 1790, 3 Pat. 163. Lord Thurlow's speech is quoted by Burge (iv. 168) as the leading authority on this point.

[3] *Hog* v. *Lashley*, 1791, M. 8193; 7 May 1792, 3 Pat. 247. See the opinion of Lord President Campbell, p. 264.

[4] *Clarke* v. *Newmarsh*, 16 Feb. 1836, 14 Sh. 488, and cases cited below. The decisions of the Courts of England are to the same effect; see *Price* v. *Dewhurst*, 4 Myl. & Cr. 81; *Jerningham* v. *Herbert*, 4 Russ. 388, and *dictum* of Sir J. Stuart in *Pearmain* v. *Twiss*, 2 Giff. 136.

ment; international law, accordingly, prescribes that the succession to these subjects shall be regulated by the law of Scotland.[1] Conversely, bonds bearing interest, and mortgages on real estate, payable in England, or in any of the colonies where the common law is in force, are moveable estate; and the Court of Session, applying the principle of international law, holds the succession to those subjects to be governed by the law of the deceased person's domicile.[2] Again, where a fund is considered to be converted from its natural character by the act of the person whose estate is under administration, *e.g.*, where it is an investment of the proceeds of property of a different character, or is held by trustees subject to a direction to sell, then its character, as converted or unconverted estate, is to be determined by the law of the domicile of the maker of the deed.[3] Incorporeal funds not classed as immoveable by the law of the *situs*, *e.g.*, bonds, bills, stock, &c., are moveable by international law, and the right to such funds passes by descent according to the law of succession of the domicile.[4]

Propinquity a matter of evidence arising on *petitio hæreditatis*.

36. (2) Propinquity, in the ordinary case, is a pure question of fact, and, as such, will be determined by the court which has cognisance of the *petitio hæreditatis* according to its own rules of evidence. This court, in the case of immoveable succession, is necessarily the judicature of the *situs* of the estate; for it alone has the power of putting the claimant into possession of the estate. In the case of moveable succession, the question, as will be seen in the sequel,[5] may be raised either in the court of the domicile or in that of the country where the subjects are situated, and where they are sought to be recovered. The writer is here speaking of the fact of relationship, *e.g.*, that A. B. is the son, brother, or first cousin of C. D.; for the computation of degrees is, of course, a part of the general law of succession, and follows the rule stated in a previous paragraph.[6] Where, however, the fact of propinquity

[1] *Ross* v. *Ross*, 4 July 1809, F.C.; *Mead* v. *Anderson*, 16 Nov. 1830, 4 W. & S. 328. See also *Murray* v. *E. of Rothes*, 30 June 1836, 14 Sh. 1049.

[2] *Newlands* v. *Chalmers' Trs.*, 22 Nov. 1832, 11 Sh. 65; *Downie* v. *Downie's Trs.*, 14 July 1866, 4 M. 1067. The principle had previously been recognised in the cases as to the respective liabilities of the real and personal estates, such as *Wightman* v. *Delisle's Trs.*, 1802, M. 4479; as to which see Chapter LXX.

[3] *Hall's Trs.* v. *Hall*, 13 July 1854, 16 D. 1057; *Murray* v. *Earl of Rothes*, 30 June 1836, 14 Sh. 1049. Here the deceased was domiciled in England according to the law of which money secured on land is personal estate. Lord Fullerton, applying the law of the *situs rei*, found that money secured on landed estate in Scotland was heritable as to succession; and, applying English rules of interpretation to the construction of a power of sale in a trust-settlement, found that the securities in question had not been converted into personalty.

[4] Ersk. 3, 9, 4. This subject is very fully discussed by Burge, Comm., part 2, chap. 1.

[5] *Infra*, Section VII.

[6] Burge's Commentaries, vol. iv. p. 157.

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depends upon the validity of a marriage, or raises a question of legitimacy, it is necessary to distinguish.

Validity of marriage and legitimacy of children.

37. Marriage in general is valid all over the world, if it has been validly contracted according to the law of the place in which the ceremony was performed or the contract made.[1] Children born *ex justis nuptiis* are legitimate all over the world; so far the laws of all civilised communities are in agreement, and no international question is likely to arise.[2] But the general investigation of the question of legitimacy pertains to the law of the domicile of the person whose *status* is in question; and to this law resort must be had where the legitimacy of any person has to be proved in order to establish a claim to a succession, whether real or personal, testate[3] or intestate.[4] By this rule (subject to the exception to be immediately noticed) all questions of legitimation *per subsequens matrimonium* are solved.[5] In the leading case on this subject,[6] the facts were that Miss Munro was born illegitimate in England, and that the subsequent marriage of her parents was contracted in England; yet, in respect that her father was at the time of her birth, and also of his marriage with her mother, a domiciled Scotsman, the lady was held to be legitimate, and to be entitled to succeed as heir-female to an entailed estate in Scotland.[7] Where, however, the law of legitimation *per subsequens matrimonium* is considered by the courts of the *situs* of the real estate to be repugnant to the institutions of the country, the law of the *situs* is applied to the case, to the effect of refusing to recognise such legitimation as constituting a title to real estate. This was the ground of decision in the English case of *Birtwhistle* v. *Vardill*, decided by the House of Lords at the same time as the Scottish cases *Munro* v. *Munro* and the *Countess of Dalhousie* v. *M'Dowall*.[8] In a later case Lord Hatherley expressed himself to this effect:— "I have myself held, and so have other judges in the English

[1] The investigation of the international relations of marriage and legitimacy would lead us too far from the present subject. We are here concerned only with the exception to the general rule which has just been stated.

[2] On this, and the correlative questions as to marriage, reference is made to Lord Fraser's Treatise.

[3] *Munro* v. *Munro*, 10 Aug. 1840, 1 Rob. 492.

[4] *Countess of Dalhousie* v. *M'Dowall*, 16 Sh. 6; 10 Aug. 1840, 1 Rob. 475.

[5] Savigny, Droit Romain, § 377, tom. 8, p. 310; 4 Burge, p. 158; and see the remarks of the same author in reference to the function of the *forum rei sitæ*, p. 155.

[6] *Munro* v. *Munro*, *supra*.

[7] This was doubtless the principle of the decision in *Goodman* v. *Goodman*, 3 Giff. 643, where an Englishman having removed to Holland, and there married his mistress, it was held that the children born in Holland were legitimated by the subsequent marriage of their parents, but that those born in England had their *status* irrevocably fixed by the law of the domicile of birth.

[8] *Birtwhistle* v. *Vardill*, reported as an appendix to the above-mentioned cases in 1 Rob. 627.

Courts, that according to the law of England a bastard child whose putative father was English at his birth, could not be legitimated by the father afterwards acquiring a foreign domicile, and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. The *status* of the child depends wholly on the *status* of the putative father, not on that of the mother. If the putative father have an English domicile, the English law does not at the birth of the child take notice of the putative father's existence. But if his domicile be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro* v. *Munro*) is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* at birth, yet recognises the father as such at the moment of his acknowledging the child either by marriage and formal recognition, as in France, or by marriage only, as in Scotland."[1] On similar principles, it was held by the House of Lords, in an appeal from the Court of Session, that heritable estate in Scotland did not pass to the issue of a marriage which the law of Scotland deemed incestuous, although by the law of England (where the marriage was contracted) the validity of the marriage could not be questioned after its dissolution.[2]

Right to legitim and *jus relictæ*.

38. The law of the domicile of the deceased, in virtue of its general function of regulating the distribution of the personal estate, determines the children's claims to legitim, and also the claims competent to the widow.[3] The case of *Hog* v. *Lashley*[4] establishes this proposition, and also this corollary from it—that inasmuch as the right to legitim or *jus relictæ* vests at death, the domicile to be considered is the domicile of the person at the time of his death, and not at the date of his marriage, or of the birth of the child. The same rule has been applied by the judges of the Court of Chancery in England in questions of the distribution of the property of deceased persons whose personal estates were situated partly in England and partly in Scotland.[5] Where the deceased is proved to have died domiciled in England, the Court of

[1] *Udny* v. *Udny*, 7 M. (H.L.) 95.

[2] *Fenton* v. *Livingstone*, 15 July 1859, 3 Macq. 497, reversing the judgment of the Court of Session.

[3] 4 Burge, pp. 158-60, as to the widow's rights, and p. 303 *et seq.*, where legitim is specially discussed in relation to international law; Bar, Int. Recht, § 112.

[4] *Hog* v. *Lashley*, 7 May 1792, 3 Pat. 247; 12 July 1804, 4 Pat. 581. See also *Colville* v. *Lauder*, 1800, M. "Succession," App. No. 1; *M. of Breadalbane* v. *M. of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377; 22 July 1837, 2 S. & M'L. 402. The law of the domicile also regulates the claim of the wife's representatives to her share of the goods in communion; *Kennedy* v. *Bell*, 2 M. 587; May 14, 1868, 6 M. 69.

[5] *Somerville* v. *Somerville*, 5 Ves. 749, 785; *Munroe* v. *Douglas*, 5 Madd. 394.

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Session, in the distribution of his moveable estate, applies the English law of succession, and recognises neither the claim of *jus relictæ*[1] nor that of the wife's representatives for a share of the goods held in communion.[2]

Collation an incident of the moveable succession.

39. Collation is regarded as an incident of the moveable rather than of the immoveable succession, and it has place accordingly only where it is recognised by the *lex domicilii*.[3] If, therefore, an intestate dies domiciled in England (where the heir is entitled to a share of the moveables without collation), the heir will not be bound to collate the Scottish heritable estate as a condition of his claiming a share of the personalty under the Statute of Distributions.[4] But where an intestate dies domiciled in Scotland, his eldest son, or other lineal representative claiming a share of the personal succession under our law, is bound to collate the real estate, whether situated in England or elsewhere, which he inherits from the ancestor as his heir-at-law.[5]

Bona vacantia.

40. According to Savigny,[6] the right to the perception of *bona vacantia* is to be regarded as supplementary to the law of succession, and it belongs to the fisk of the defunct's last domicile. This statement may be admitted subject to the necessary correction for the case of immoveable property.

SECTION II.

VALIDITY AND EFFECT OF WILLS AND TESTAMENTARY WRITINGS.

Validity in relation to—(1) the granter; (2) the grant or the grantee; (3) the instrument.

41. A testamentary disposition may be null or ineffectual—(1) by reason of some disability personal to the granter; (2) by reason of some prohibition of the municipal law applicable to the nature of the grant, or to the person of the grantee; and (3) by reason of some informality in the instrument itself, or in the solemnities attending its execution.

What law regulates the disposing capacity.

42. (1.) Incapacity may result from weakness of mind; from nonage; or from the restraints which are imposed by positive law on the weaker sex, and particularly on married women. *Prima facie*, the capacity to perform any legal act is to be determined by the law of the domicile;[7] but the strict application of this principle

[1] *Nisbett* v. *Nisbett's Trs.*, 24 Feb. 1835, 13 Sh. 517.

[2] *Newlands* v. *Chalmers' Trs.*, 22 Nov. 1832, 11 Sh. 65; *Maxwell* v. *M'Clure*, 20 D. 307; 7 March 1860, 3 Macq. 852.

[3] 4 Burge, 730; Pothier, Successions, ch. 4, art. 3, ed. Dupin, tom. 7, p. 219.

[4] *Balfour* v. *Scott*, M. 2379; 11 March 1793, 3 Pat. 300; *Robertson* v. *Robertson*, 16 Feb. 1816, F.C.; *Brodie* v. *Barry*, 2 Ves. & Bea. 130.

[5] *Robertson* v. *M'Vean*, 18 Feb. 1817, F.C.; *Dundas* v. *Dundas*, 14 Jan. 1829, 1 Jur. 7.

[6] Savigny, Droit Romain, § 377, tom. 8, p. 311; Bar, Int. Recht, § 114.

[7] In the case of a change of domicile, the capacity of making a testament, ac-

is attended with inconvenience, and a better rule would be that, as regards the disability of nonage, a contract should be held valid if the party against whom it is to be enforced were of an age to contract, either by the law of his domicile or by the law of the place where the contract was made. The rule is exemplified in the case of *Cooper* v. *Cooper*,[1] where a widow, domiciled in Ireland while unmarried, and thereafter in Scotland, by her marriage with a Scotsman, claimed terce and *jus relictæ*, alleging that her marriage-contract (which excluded these rights) was void by reason of her minority, or infancy, at the time of execution. The judgment on the main question was in favour of Mrs. Cooper, for reasons which are succinctly given by Lord Macnaghten in the following passage: "As regards the contracts of infants, the law of Ireland, which does not differ from that of England, is well settled. Infants are incapable, speaking generally, of binding themselves absolutely by contract. A settlement on marriage, not being a settlement under the Infants' Settlement Act (18 and 19 Vict., cap. 43), forms no exception to the rule. *Prima facie*, therefore, Mrs. Cooper was not bound by the settlement in question."[2] On the question here considered their Lordships did not find it necessary to express an unqualified opinion, because they held it established that Ireland must be taken to be the place of execution of the contract as well as the domicile of the lady, rejecting the view that Scotland, as the matrimonial domicile, should be taken to be the place of performance, and in this sense the *locus contractus*. But the observation of the same judge is significant: "It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile.[3] As regards testamentary deeds, the same reasons do not exist for relaxing the rule; and in principle it would seem that the *testamenti factio*, or capacity to make a testa-

cording to Savigny (Droit Romain, § 377, tom. 8, p. 307, also § 393), is required at two different periods, that of the date of the testament, and that of the death of the testator. But the rule of our law (see § 55, *infra*), that a will valid at the time of execution is not invalidated by a subsequent change of domicile, would doubtless be held to cover the case of objections applicable to the capacity of the testator. The same author lays down that the "personal capacity," as to age and the like, is ruled by the law of the testator's domicile at the time of execution, without reference to subsequent changes of domicile. The subject of personal capacity in its international relations is very fully treated by Fœlix and Demangeat, § 86, 4ème ed., tom. i. p. 196. See Burge, vol. iv. p. 576; Story, ch. iv. § 50 *et seq.*; Fraser, Parent and Child, 2d ed., p. 580; De Chassat, de Statuts, pp. 416-429; Bar, Int. Recht, § 108.

[1] 24 Feb. 1888, 15 R. (H.L.) 23.

[2] *Cooper* v. *Cooper*, 15 R. (H.L.) 30.

[3] Similar observations by Lords Halsbury and Watson, pp. 25, 29.

ment, is governed by the law of the domicile.[1] In the case of real estate, the law of the *situs* seems to have the power of imposing disabilities in addition to those which result from the application of the *lex domicilii*.[2] Thus, it may be that a married woman would not be able to grant an effectual disposition of her heritable estate in Scotland without her husband's consent, even though by the law of the domicile she were of full age, and not subject to legal disability in respect of coverture. Our limits do not admit of entering on a further exposition of the law of personal capacity and status.[3]

Law which determines the validity of the bequest.

43. (2) With respect to invalidity attaching to the subject or nature of the bequest,[4] no good reason can be assigned for deviating in this respect from the general rule, which assigns a paramount importance to the *lex domicilii* in all that concerns the moveable, and to the *lex loci rei sitæ* in relation to the immoveable estate. Both branches of our proposition are supported by the general tenor of the authorities in the law of Scotland. And first, as regards personal succession, the case of *Boe* v. *Anderson*,[5] which received much and repeated consideration, is an authority for the proposition that the validity of a bequest is to be judged of by the law of the domicile. This was a bequest by a domiciled inhabitant of the State of Louisiana of a sum of money to the poor of the town of Dunblane, in Scotland, "to be divided by the resident minister of the Presbyterian Church, and the two highest civil officers in the town, to be paid upon due proof of their acceptance of the trust," &c. The Court directed an inquiry as to the law of Louisiana in reference to charitable trusts, and on proof that donations for charitable purposes to trustees, or persons other than municipal corporations, were ineffectual according to the laws of that state, judgment was given adversely to the validity of the bequest. In a case which was brought before the Court of Session at the instance of the testamentary trustees of a Scotsman who had property in England as well as Scotland, objection was taken by the heir to the clause disposing of residue on the ground that the law of Mortmain prohibited the appropriation by will of real

[1] Burge's Commentaries, vol. iv. p. 579.

[2] 4 Burge, 576-9, citing Dumoulin ad Cod. tom. 3, p. 554, Peckius de Test. Conj. 4, 28, 7, and other jurists.

[3] Under the old law of Scotland, which withheld the *testamenti factio* from bastards, it was decided that the will of a bastard domiciled in England did not carry moveables in Scotland; *Purvis* v. *Chisholm*, 1611, M. 4494, cited by Ersk. 3, 2, 41. This decision appears to be at variance with international law, and although the statute 6 Will. IV., cap. 22, applies only to bastards domiciled in Scotland, there can be no doubt that the will of a bastard would receive effect in Scotland according to the capacity of the granter in the place of his domicile.

[4] Savigny, Droit Romain, § 377, ed. Fr. tom, 8, p. 308; Story, Confl. §§ 479 (*c*), 479 (*d*).

[5] *Boe* v. *Anderson*, 8 March 1862, 24 D. 732.

estate in England to charitable uses. An opinion was obtained from an English judge on this point, and judgment was given in conformity with it.[1] So in an early case [2] in the House of Lords it was held, reversing the decree of the Court of Session, that the validity of a condition in a will in restraint of marriage fell to be decided by the law of England, in respect that the testator was domiciled there.

Law which determines the capacity to take.

44. The question of the lawfulness of a bequest or grant is closely identified with that of special incapacity attaching to the grantee, and, for example, such restrictions as those of the English statute of Mortmain, may, with equal propriety, be referred to either class. Such restrictive laws can only come under the cognisance of the Courts of Scotland in cases of foreign succession, and in this place it is only necessary to state the general principles on which they are supposed to be decided. According to Savigny,[3] a distinction is to be taken between (1) personal incapacity (depending on age, sex, marriage, or the like), which is governed always by the law of the grantee's domicile, never by that of the defunct; and (2) incapacity resulting from laws "strictly obligatory" (*e.g.*, *Mort Civile* in France, Mortmain in England), as to which he says the tribunal called to pronounce on the question will apply its own laws, and will consider for itself whether the incapacity is such as it ought to recognise.

English Mortmain Act.

45. With reference to incapacity under the second head, it has been decided that legacies under an English will of money to be laid out in the purchase of land or heritable securities *in Scotland*, to be applied to charitable uses within that country, do not fall within the prohibitions of the existing Mortmain Act, 9 Geo. II., cap. 36.[4] But a bequest of money to be laid out in the purchase of lands, with the intention of appropriating the rents to charitable uses in Scotland, was held by Lord Lyndhurst to be void under the Mortmain Act, because it did not appear upon the face of the will that the testator had not contemplated the purchase of lands in England for the support of a charitable institution in Scotland.[5] The Court of Session does not consider itself to be precluded by the Mortmain Act from giving effect to settlements made in Scotland of stock in the British funds for charitable purposes to be executed in Scotland.[6] With reference to personal capacity, we

[1] *Hewit's Trs.* v. *Lawson*, 1891, 18 R. 793.

[2] *Ommanney* v. *Bingham*, 15 March 1796, 3 Pat. 448.

[3] Droit Romain, § 377, tom. 8, pp. 309-10. The doctrine here enunciated is received in Scotland. See cases in next paragraph.

[4] *Mackintosh* v. *Townsend*, 16 Ves. 330.

[5] *Attorney-Gen.* v. *Mill*, 2 Russ. C. C. 328, 5 Bligh., 593. See *Curtis* v. *Hutton*, 14 Ves. 537, 541.

[6] *Macara* v. *College of Aberdeen*, 1786, M. 15,946; Hailes, 975.

CHAPTER II.

Exclusion of marital rights. Marriage-contracts.

have decisions to the effect that the question whether a legacy carries with it the exclusion of the *jus mariti* of the husband of the legatee (involving necessarily the consideration of the competency of excluding such rights) depends upon the law of the domicile.[1] The law of the domicile, moreover, is held to be the governing law in relation to the question whether the provisions of a marriage-contract are or are not revocable.[2]

Nuncupative wills.

46. On one rather perplexing point touching the validity of testamentary dispositions, a decision was pronounced which evidently proceeded on the principle of Savigny's second proposition,[3] that laws of a strictly obligatory character must be enforced, irrespective of the rules of the law of the domicile; and this decision derives weight from being mentioned with approval by Erskine.[4] We mean the decision that a nuncupative will (effectual according to the laws in force in England before the Statute of Wills) would not carry moveable estate situated in Scotland. The law of Scotland requires written evidence of a last will, and although as regards the mere forms of attestation it may be willing to defer to the laws of the domicile, it cannot, consistently with its own fundamental principles, recognise a will which is wholly defective in the essentials of execution.

Validity of disposition of heritable estate ruled by the law of Scotland.

47. As regards the application of the *lex loci rei sitæ* to the determination of the validity of testamentary dispositions of *immobilia*,[5] the decisions of our courts have been clear and consistent. Heritable estate in Scotland could not at common law be transferred by a testament or last will; and numerous are the cases in which the wills of foreigners have been found ineffectual for this purpose in spite of the clearest evidence of an intention to convey,[6] In other cases, wills in the English form, and containing clauses of revocation of prior wills, have been held ineffectual to revoke settlements of landed estate in Scotland; but these decisions

[1] *Abbey* v. *Railton*, 14 May 1830, 8 Sh. 746; *Hall's Trs.* v. *Hall*, 13 July 1854, 16 D. 1057. Compare *Clarke* v. *Newmarsh*, where the question was whether a right of succession, which had vested in a married lady domiciled in Scotland, fell under the *jus mariti* (16 Feb. 1836, 14 Sh. 488).

[2] *Ramsay* v. *Cowan*, 11 July 1833, 11 Sh. 967.

[3] *Supra*, p. 25.

[4] *Shaw* v. *Lewis*, 1665, M. 4494, cited in Ersk. 3, 2, 41. See *Bradford* v. *Young*, 1884, 11 R. 1135.

[5] 4 Burge, 216-20: "The power of making the alienation by testament is no less *qualitas rebus impressa*, than that of making the alienation by contract. When, therefore, the question arises, whether the immoveable property may be disposed of by testament, recourse must be had to the *lex loci rei sitæ*" (p. 217).

[6] *Melvil* v. *Drummond*, 1634, M. 4483; *Burgess* v. *Stanton*, 1764, M. 4484; *Crawfurds* v. *Crawfurd*, 1774, M. 4486, Hailes, 530; *Henderson* v. *Selkrig*, 1795, M. 4489; *Crs. of Robertson* v. *Mason*, 1795, M. 4491; *Montgomery* v. *Innes*, 1795, Bell, Fol. Ca. 203; *Mead* v. *Anderson*, 16 Nov. 1830, 4 W. & S. 328. The question of intention is *juris domicilii*, as to which see Section V. *infra* (Election).

probably turned on the construction of the term "will," as not comprehending dispositions of lands;[1] and it is now settled that a settlement of heritage may be revoked by a foreign will.[2] But letters of instructions to trustees regarding the disposal of heritable estate previously conveyed to them,[3] and also wills or codicils dealing with heritable estate in the exercise of reserved powers,[4] were and are, as regards the validity of the instrument and the form of attestation, subject to the same international rules as wills of personal estate.[5]

Equitable modification of this rule.

48. For some time before the passing of the Titles to Land Act, 1868, which enabled a testator to dispose of lands by a will without the use of words of *de præsenti* disposition, the tendency of the decisions was to restrict the application of the rule requiring *de præsenti* words as much as possible, and in the last edition of this book the writer described the then recent case of *Richmond's Trustees*[6] as a bridge thrown to testators in England by which they might avoid the perils resulting from the use of testamentary language with respect to gifts of lands. The testator, while domiciled in Scotland, executed a *mortis causa* trust-disposition and settlement, whereby he conveyed to trustees his whole heritable and moveable estates for certain purposes. The testator afterwards went to reside in Ireland, where he executed a last will and testament,—not probative by the law of Scotland, and not expressed in terms sufficient to carry Scottish heritage,—wherein, without referring to the previously executed settlement, or to the trustees therein named, he bequeathed to certain other parties, as his trustees and executors, his whole estates, real and personal,

[1] *Dundas* v. *Dundas*, 1783, M. 15,585, 21 May 1783, 2 Pat. 618.

[2] *Purvis' Trs.* v. *Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812, *infra*, p. 29.

[3] *Stewart* v. *Watson*, 1791, Bell's Oct. Ca. 225; *Ker* v. *Lady Essex Ker's Trs.*, 24 Feb. 1829, 7 Sh. 454; *Melvin* v. *Nicol*, 20 May 1824, 3 Sh. 31, N.E. 21.

[4] *Cameron* v. *Mackie*, 9 Sh. 601, 29 Aug. 1833, 7 W. & S. 106. *Kidd* v. *Kidd*, 9 June 1843, 5 D. 1187. In *Tatnall* v. *Hankey*, 2 Moo. P.C. Ca. 342, it was held that a will made in execution of a power may be authenticated in the manner prescribed by the law of the place where the power was created. See also *re Alexander*, 29 L.J. Prob. 93.

[5] As to the application of the *lex loci rei sitæ* in other countries, see the authorities collected in 4 Burge's Comm. 218-20. The law of the *situs*, which requires that the testator should survive the execution of his will for a certain number of days (a rule which prevailed under the customary law of Normandy as well as of Scotland), is to be applied although the testator should have died domiciled in a country where no such rule prevails.

[6] *Richmond's Trs.* v. *Winton*, 25 Nov. 1864, 3 M. 95. The authorities chiefly relied on were *Cameron* v. *Mackie, supra; Leith* v. *Leith*, 6 June 1848, 10 D. 1137; and *Willock* v. *Auchterlonie*, M. 5539, 30 March 1772, 3 Pat. 659. It will be observed that the conditions of the case would not be materially varied, if we supposed the last will to be made in Scotland, but not in the form of a settlement containing a new dispositive conveyance. In this view the question is not purely an international one; and, since Parliament has seen fit to dispense with the word "dispone" in conveyances, the point is now of little practical importance.

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wheresoever situated, and, *inter alia*, gave directions for the disposal of his heritable estate in Scotland which were inconsistent with the directions given by the previously executed settlement. The law applicable to the construction of the two testamentary instruments was expressed in the following declaratory findings: —(1) That the last will and testament executed by the deceased W. R. did not contain any valid conveyance of his Scottish heritable estate. (2) That the trust-disposition and settlement, in so far as concerned the conveyance of the said estate, was not revoked by the last will and testament. (3) That the trust-disposition and settlement subsisted, and was effectual as a conveyance of such estate, for the purposes therein declared, or to be declared by any subsequent writing. (4) That the trust-disposition and settlement and the will were to be taken as containing, together, the whole of the testator's testamentary purposes, including his purposes with respect to the distribution of the Scottish heritable estate. (5) That the Scottish trustees were bound to give effect to the purposes expressed in the said will, by conveying the Scottish heritable estate to the trustees named in the will for the purposes therein expressed, to the exclusion of the purposes declared by the trust-disposition and settlement.[1] Such cases have now only a historical interest.

What law regulates the authentication of wills.

49. (3.) According to the best opinions, a will disposing of moveable estate may be authenticated either in the form prescribed by the *lex loci actus*, or according to the forms of the *lex domicilii;* testamentary dispositions or devises of immoveable estate, either according to the *lex loci actus* or according to the *lex loci rei sitæ*.[2]

Authentication of settlements of heritable estate.

But as regards the latter, it would not be safe to rely upon an authentication according to the rules of the *lex loci actus;* and the Scottish authorities seem to require that deeds of settlement of heritable estate should be in the form prescribed by the *lex loci*

[1] Abridged from the interlocutor of the Second Division of the Court, 3 M. 113. In a cognate case, *Thomas* v. *Tennent's Trs.*, 17 Nov. 1868, 7 M. 114, the same principle of construction was applied, but in consequence of the failure of the purposes of the English will, the estate resulted to the heir-at-law.

[2] Savigny, Droit Romain, tom. 8, p. 351; Fœlix, §§ 73-85, 4ème ed., tom. 1, pp. 164-196; 4 Burge's Comm. p. 581; Bar, Int. Recht, § 109. The authorities cited by Burge, pp. 582-587, clearly establish the applicability of the rule *locus regit actum* to settlements of immoveable as well as of moveable estate; and, in Mr. Burge's opinion, the *lex loci actus* is applicable unless in cases where the local law expressly requires that deeds relating to real estate should be authenticated according to its forms (p. 584). It is remarkable that Story, who brings forward an elaborate array of authorities to establish the application of the laws of the domicile (§§ 464-473) and of the *locus rei sitæ* (§§ 474-479) in relation to the form and attestation of wills of moveable and immoveable estate respectively, is silent as to the application of the maxim *locus regit actum* to testaments or wills of moveables.

rei sitæ as regards matters of style and authentication. Thus, a foreign will made before 1868 would be held ineffectual to dispose of heritable estate, even if it were tested according to our law, because it is not a *de præsenti* conveyance;[1] while a dispositive conveyance of lands in Scotland executed abroad would be held invalid if any of the statutory or other solemnities prescribed by the law of Scotland were omitted.[2]

Distinction in case of an obligation to convey.

50. But the restrictive operation of the *lex loci rei sitæ* appears to be confined to deeds of actual conveyance; and accordingly, it was held that an obligation to convey Scottish heritable estate might be effectually undertaken in a deed framed in conformity with the *lex loci actus*, even where the subject of the conveyance was an inheritance.[3] On this principle it should seem that a mandate or power of attorney, executed in conformity with the law of the granter's residence, would be a good authority for the execution of a regular conveyance.[4] It was also decided, after much learned research and consideration, that a settlement of heritage might be revoked by a deed executed according to the law of the testator's residence, or *lex loci actus* at the time when the deed of revocation was made.[5]

Revocation of settlement of heritage.

Authentication of wills of moveable estate.

51. With respect to wills of personalty, the rule *locus regit actum* seems to be of universal application. The general opinion of modern jurists is also favourable to the recognition of wills executed according to the forms required by the law of the testator's domicile;[6] and, in practice, the wills of British subjects resident abroad were always admitted to probate or confirmation if executed in conformity with the rules of our law. The Act 24 and 25 Vict., cap. 114, declares valid any will or other testamentary writing executed in conformity with the forms prescribed "either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile or origin."[7] This enactment does not apply to settlements of heritable or real estate—the validity of

[1] *Melville* v. *Drummond*, 1634, M. 4483; *Crawfurds* v. *Crawfurd*, 1774, M. 4486.

[2] Ersk. 3, 2, 40, citing *E. of Dalkeith* v. *Book*, 1729, M. 4464; *Purvis' Trs.* v. *Purvis' Exrs.*, 23 Mar. 1861, 23 D. 822, *per curiam*.

[3] *Cunningham* v. *Lady Semple*, 1706, M. 4462; *Govan* v. *Boyd*, 1790, Bell's Oct. Ca. 223.

[4] See Menzies' Convey., 3d ed. p. 145. As to wills made in execution of powers, see p. 27, *supra*.

[5] *Purvis' Trs.* v. *Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812, 816, where all the English and foreign authorities are cited; *Leith's Trs.* v. *Leith*, 6 June 1848, 10 D. 1137.

[6] 4 Burge, pp. 558-90; Story, §§ 464-473, and cases there cited. In the case of *Nasmyth*, 2 Addams, 6, the will of a domiciled Scotsman, made in England, but authenticated according to that of Scotland, was admitted to probate.

[7] 24 and 25 Vict., cap. 114, §§ 1 and 2.

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which, not being originally dependent on the law of the domicile, cannot of course be held to be affected by a change of domicile.

Effect of a change of domicile.

52. In the case of *Purvis' Trustees* v. *Purvis' Executors*, it was determined, on a reference to the whole Court, and after elaborate argument, that a will executed in conformity with the requirements of the *lex loci actus* was not invalidated by reason of the subsequent change of domicile of the testator.[1] This appears to be a necessary deduction from the proposition that the will is valid if authenticated in the manner required by the laws of the place in which it is executed. By the last-mentioned statute[2] it is provided that no will or other testamentary instrument shall be held to be revoked, or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

SECTION III.

Interpretation of Wills and Testamentary Writings.[3]

Law of the domicile the primary canon of interpretation.

53. According to the principles of international jurisprudence, the law of the domicile of the testator at the time of his death governs the interpretation of his testamentary dispositions.[4] A rule so settled and so universally received[5] may be supposed to

[1] 23 D. 812. On the question whether a will executed in conformity with the requirements of the *lex domicilii* would be invalidated by a change of domicile, see Story, § 473 ; 4 Burge, p. 580 ; Savigny, § 377, tom. 8, pp. 306-8 ; Voet ad Pand. 28, 3, 12-13 ; Rodenberg, de Stat. Confl., tit. ii. par. 2, cap. 1 and 3 (pp. 104, 112 of ed. 1653), and observations of Boullenois, vol. ii. pp. 7, 68 ; Fœlix and Demangeat, § 117, 4ème ed., tom. i. p. 263. It is to be observed that the questions discussed in the passages cited have relation also to the invalidation of testaments by defect of capacity in the granter consequent on change of domicile. The questions are closely connected in practice as well as in the considerations upon which their resolution depends.

[2] 24 and 25 Vict., cap. 114, § 3.

[3] On the subject of the construction of marriage-contracts as affected by international law, we refer to Lord Fraser's able exposition (vol. i. p. 736 *et seq.*). The chief distinction is, that the construction is regulated generally by the law of the "matrimonial domicile," or domicile of the spouses at the time of the marriage.

[4] Sir Charles Douglas' case (*Ommanney* v. *Bingham*), 15 Mar. 1796, 3 Pat. 448. "It is admitted," said Lord Loughborough, "not merely in both parts of Great Britain, but in all, at least most, of the civilised countries in Europe, that it is the place of a man's domicile which must give the rule for the distribution of his personal property. . . . The determination of your Lordships" (alluding to the decisions in *Bruce* v. *Bruce*, 3 Pat. 163, and *Hog* v. *Lashley*, 3 Pat. 247), "which has been acquiesced in and followed in Scotland, has now settled it as law that the distribution of an intestate's personal estate, *or the construction or effect of a will*, must be governed by the law of the place where the intestate, or the testator, had his last domicile" (3 Pat. 457). See also Lord Brougham's observations in *Yeates* v. *Thomson*, 1 S. & M'L., 835 *et seq.*, as to the general application of this rule.

[5] Savigny, Droit Romain, § 377, tom.

require no elucidation; but an attentive study of the authorities leads to the conclusion that even this fundamental doctrine of international right is not absolutely true for every case of interpretation of a will, and that it is only by admitting the doctrine of subordinate canons of construction that it can be maintained as a universal proposition. Accordingly, in the discussion of this part of the subject, the object will be to discover what are the necessary modifications of the rule, and what are the limits within which the operation of subordinate rules of construction are to be confined.[1]

Generality of the rule. Its application to testamentary provisions in marriage-contracts.

54. The generality of the application of the law of the domicile to the construction of testamentary instruments is illustrated by a class of cases noticed in the preceding section,[2] where this law is invoked to decide upon the validity or invalidity of a disposition or bequest. For there can be no more authoritative application of the function of construction than that which consists in applying to the testamentary writing rules of municipal law by which its provisions are annulled or rendered inoperative. It may safely be asserted that the law of the domicile is primarily applicable, wherever the purpose of the instrument, or of any of its provisions, is testamentary, although the form of the instrument may be that of a *de præsenti* conveyance or of a contract—as, for example, where a testamentary disposition is engrafted on a contract of marriage.[3] And in a question of the construction of a testamentary instrument or instruments, the dispositions of which have relation to more than one system of laws, the law of the testator's last domicile is to be regarded as furnishing the fundamental canon or law of interpretation. It alone takes cognisance of the succession as a whole; it assigns to the several parts of the will their places in the order of succession; it reconciles conflicting provisions, and adjudicates upon all questions of implied revocation, and by the application of the principle of election imparts unity and consistency to the entire scheme of disposition.[4]

Subordinate canons of interpretation.

55. We proceed to the consideration of the limits within which laws other than that of the domicile may be admitted as subordinate canons of interpretation. The exceptions to the application of the law of the domicile which have been recognised in our prac-

8, p. 308; and § 374B, p. 260; Fœlix and Demangeat, 4éme ed. i. 260; Story, § 479 (*a*); 4 Burge, p. 590; Voet ad Pand. 28, 5, 16, and 17; 36, 1, 25; Boullenois, Stat. ii. p. 419. With reference to the effect of a change of domicile on the meaning and construction of the will, see Story, § 479 (*g*), and authorities there cited.

[1] As to the exercise of the function of the Court of construction in the interpretation of a foreign will, see Section VIII. of this chapter.

[2] *Supra*, p. 24.

[3] *Hog* v. *Lashley*, 7 May 1792, 3 Pat. 247 (3d point); and see *Abbey* v. *Railton*, 14 May 1830, 8 Sh. 746; *Ramsay* v. *Cowan*, 11 July 1833, 11 Sh. 967.

[4] See the cases *infra*, Section VIII.

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tice are referable to one or other of the following propositions:— *First*, Where a will or settlement disposes of immoveable estate, its construction, in so far as relates to that estate, is to be determined by the law of the *situs*. *Secondly*, A will expressed in the technical conveyancing phraseology of the country in which the succession is to be distributed, is to be construed by the judges of that country from their own knowledge of the meaning of its language. *Thirdly*, Similarly as to wills expressed in popular language, to which the law of the domicile assigns no special interpretation. *Fourthly*, A will expressed in the language, and clothed in the technical phraseology of the place in which it was executed, seems, according to the best opinions, to be subject to interpretation by the law of that place rather than by the law of the domicile; and, in any view, effect must be given to such explanations as the *lex loci actus* can give of its own technical phraseology, as a part of the scheme of disposition to which the theory of interpretation furnished by the law of the domicile is to be applied. *Fifthly*, Subject to the qualification implied in the last-mentioned rule, the law of the domicile controls, and in case of direct conflict overrules, the interpretation furnished by the *lex loci actus*.[1] In conclusion, attention will be called to some cases of construction which are treated as special by the jurists.

Wills of immoveable estate interpreted by law of the *situs rei*.

56. (1.) The simplicity and generality of the rule which assigns to the law of the *situs* the function of the interpretation of dispositions of immoveable estate renders any detailed exposition unnecessary. The decisions of our Courts furnish many illustrations of its application to settlements, whether of heritage in Scotland,[2] or of real estate elsewhere.[3]

Interpretation of wills indirectly disposing of real estate.

57. The operation of the *lex loci rei sitæ* is confined to settlements disposing of the estate itself as an immoveable subject. The interpretation of testamentary provisions, which are in their nature personal although affecting real estate, appears to be subject to the law of the domicile. Of this nature are instructions to trustees of heritable estate,[4] wills in execution of reserved powers

[1] The international jurists for the most part deliver too absolutely the doctrine of interpretation *secundum legem domicilii*. Bar alone, amongst the modern writers whose works have been consulted, alludes to those elements which may modify the construction suggested by the law of the domicile, such as language, local usage, and the technical expressions of the system of jurisprudence with which the testator was familiar, or which he had in view in preparing his will (Int. Recht, § 110).

[2] *Blackett* v. *Gilchrist*, 30 May 1832, 10 Sh. 590; *Weir* v. *Laing*, 6 Dec. 1821, 1 Sh. 192, N.E. 181; and the series of cases cited above, on the invalidity of English wills to convey heritage, ending with *Mead* v. *Anderson*, 4 W. & S. 328.

[3] *Macalister's Exrs.* v. *Macalister's Trs.*, 18 Dec. 1834, 13 Sh. 171; *Ramsay* v. *Cowan*, 11 July 1833, 11 Sh. 967.

[4] *Stewart* v. *Watson*, 1701, Bell's Oct. Ca., 225; *Ker* v. *Lady Essex Ker's Trs.*, 24 Feb. 1829, 7 Sh. 454.

of disposal,[1] obligations *inter vivos* to convey or burden heritable estate,[2] and deeds of revocation.[3] As to these, the law of Scotland pronounces in favour of the applicability of the *lex domicilii*. And the construction of a bequest of a general residue, or share of mixed real and personal succession, is in any case to be determined by the law of the domicile, for it would not be reasonable that distinct destinations should be impressed upon subjects which, according to the language of the instrument, are apparently given to the same persons.[4]

By what law the quality of the estate is determined.

58. It may happen that, in the construction of a deed, resort must be had to different systems of law, *e.g.*, the law of the testator's domicile for the ascertainment of his intention regarding the disposal of his personal property, and the *lex loci rei sitæ* for the ascertainment of the effect to be given to his disposal of real or heritable property. A question then arises, which has already been considered in connection with the international regulation of intestate succession, namely, which of these systems of law is to determine the quality of a given description of property, as real or personal.[5] The case of *Newlands* v. *Chalmers' Trustees* was properly one of intestate succession. Mrs. Chalmers, one of the persons whose succession was in dispute, left a trust-deed of settlement, but this deed, together with her contract of marriage, were reduced, and the succession of Mrs. Chalmers and her husband were thus left to the operation of law. A multiplepoinding having been brought in the Court of Session the main question was, whether certain Jamaica bonds and negotiable paper left by the husband (who had died domiciled in Jamaica) were to be deemed heritable or moveable. The Court held, on the principle of the decision in *Egerton* v. *Forbes*,[6] that the quality of the estate—that is, whether the securities were real or personal property—must be determined by the law of Jamaica, where they were executed.[7]

Application to testamentary succession.

59. The principle that the quality of the estate falls to be determined by the law of the *situs*, is equally applicable whether the

[1] *Cameron* v. *Mackie*, 9 Sh. 601; 29 Aug. 1833, 7 W. & Sh. 106; *Brack* v. *Hogg*, 25 Feb. 1831, 5 W. & S. 61, and authorities there cited.

[2] *Govan* v. *Boyd*, 1790, Bell's Oct. Ca. 223. See on this point, Ersk. 3, 3, 39-40; Kames' Equity (ed. 1778), vol. ii. p. 328; 1 Burge, 24; *contra* Story, Conflict, § 372 (*f*).

[3] *Purvis' Trs.* v. *Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812.

[4] The case of *Brown's Trs.* v. *Brown*, 4 W. & S. 28, cited by Story, § 490, scarcely touches the point; and the proposition may be left to stand on its own merits, only observing that the cases of division of mixed estate, in the law of constructive conversion, have no bearing on the question. *Here* the question is as to the testator's meaning; *there* it is as to the course of succession *ab intestato*, after the estate has already vested in the legatees.

[5] See Story, § 479 (*a*); 4 Burge, 591; *Stewart* v. *Garnett*, 3 Sim. 298.

[6] *Egerton* v. *Forbes*, 27 Nov. 1812, F.C.

[7] *Newlands* v. *Chalmers' Trs.*, 22 Nov. 1832, 11 Sh. 65; and see the cases on intestate succession cited *supra*, § 35.

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question is to be determined for the purpose of fixing the distribution of the estate itself as intestate succession under the law of the *situs*, or for the subordinate but important purpose of resolving whether a will or settlement disposing of such estate is to be construed by the law of the domicile or by the law of the *situs*.[1] This is illustrated by the case of *Ross* v. *Ross*,[2] where it was held, *first*, that a personal bond to heirs secluding executors was heritable *ex sua natura*, though it was conceded that, by the law of England, which was the *locus actus* of the testament, a destination to heirs would not impart the quality of real estate to a personal security; and, *secondly*, that the security was to be regarded as real estate situated in Scotland, and therefore as not capable of being carried by an English will which was effectual to pass real estate in England.[2]

Settlements expressed in the technical law language of Scotland.

60. (2.) That the law of Scotland may legitimately be employed to determine the construction of foreign trusts, when falling to be administered in Scotland, and expressed in the phraseology of Scottish conveyancing, is a doctrine well established in our law, although of comparatively recent development. The cases of *Cameron* v. *Mackie* and *Norton's Trustees* v. *Menzies* are examples. In each case the settlement consisted of a trust-disposition in the Scottish form in combination with an English will; and the Court applied the rules of the law of Scotland to the interpretation of the total settlement.[3] (3.) In the case of *Thomson's Trustees* v. *Alexander* the same method of interpretation was applied by the whole Court (contrary to the opinions of Lord Colonsay and a strong minority) to the construction of a will made in Newfoundland, expressed in ordinary colloquial language, and not containing any technical expressions.[4]

Wills expressed in popular language.

61. In *Ferguson* v. *Marjoribanks*,[5] a testator, domiciled in Jamaica, by his will executed in that island, bequeathed to trustees in Scotland the residue of his estate, consisting of real and personal property in Jamaica, to be applied by them in the erection and endowment of a free school *in Scotland*. The Court were unanimously of opinion that the construction of the will, in relation to the execution of the trust, was to be determined by the law of Scotland, and not by that of Jamaica. "It were certainly a very

[1] *Ross* v. *Ross*, *infra*; *Mead* v. *Anderson*, 16 Nov. 1830, 4 W. & S. 328. See *Wightman* v. *Delisle's Trs.*, 1802, M. 4479, where the question was as to the respective liabilities of the real and personal estates.

[2] *Ross* v. *Ross' Trs.*, 4 July 1809, F.C.

[3] *Cameron* v. *Mackie*, 19 May 1831, 9 Sh. 601; *Norton's Trs.* v. *Menzies*, 4 June 1851, 13 D. 1017.

[4] *Thomson's Trs.* v. *Alexander*, 18 Dec. 1851, 14 D. 217.

[5] *Ferguson* v. *Marjoribanks*, 1 April 1853, 15 D. 637. And see the decision of the same eminent judge and scholar to the same effect in *Rainsford* v. *Maxwell*, 1852, 14 D. 450.

anomalous result," said Lord Rutherfurd, "and one not consistent with the best interests of such a trust, that the Scotch law, which had the only direct jurisdiction, should be forced to discharge its duty, not by its own light, but by the dim reflection of the English law, as it might be gathered from the opinions of English counsel. . . . The Lord Ordinary is more confirmed in this view from two circumstances: one, that the deed, especially as regards the constitution of the Scotch trust, is expressed in apt terms of the Scotch law, and that it is not necessary for the Scotch Courts to refer to English law to give a meaning to those terms; so that the Court is not driven to go elsewhere for the explanation of words which are not immediately intelligible. The other is, that the construction which would be put upon it by the Scotch law seems to coincide with what is the plain intention of the testator."[1] The fact that in this case Scotland was also the forum of administration was obviously a very material element in the decision of the case. A similar decision was given in *Mitchell and Baxter* v. *Davies*,[2] and again in *Elliott's Trustees* v. *Waddell*,[3] the one case being that of a will made by a Scottish lady married to an Englishman, the will being in execution of a power to dispose of heritage, and expressed in the form of a Scottish deed of trust; the other case being that of a marriage-contract in the Scottish form, where the wife was of Scottish extraction and the husband an Englishman. "It appears to me," said Lord President Inglis, "that the administration of this estate under the deed is essentially Scotch, and that if any question arose as to the nature of the securities in which the trustees should invest the funds, it must be determined by the law of Scotland, because the deed is expressed in words of Scotch conveyancing, and the trustees are directed to have regard to their powers as expressed in that language."[4] It is unnecessary to multiply quotations and references on this subject, because the principle that a court may use its own judgment in the interpretation of a foreign will, and may apply to its construction the ordinary processes of grammatical and literary criticism, is now universally received and acted on; the cases of wills expressed in technical language with which the court is not familiar, or which are subject to the operation of special rules of construction, being treated as exceptional.

62. The principle of *construction* according to the intention and the language chosen by the maker of the deed to express his ideas, was put to a crucial test in a case in the House of Lords, *Studd* v. *Cook*,[5]

[1] 15 D. 639.
[2] 3 Dec. 1875, 3 R. 208.
[3] 13 Nov. 1879, 7 R. 200.
[4] *Elliott's Trs.* v. *Waddell*, 7 R. 206.
[5] 8 May 1883, 10 R. (H. L.) 53, affirming 8 R. 249.

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where the question was whether an English will devising "such lands in the counties of Devon and Inverness in Scotland" as consisted of freehold of inheritance, was capable of receiving effect as a will of heritage under the 20th section of the Titles to Land Act, 1868. The question of intention to pass heritable estate was primarily a question in the law of Scotland as modified by statute. But inasmuch as the testator had clothed his intention in the technical language of English law, the House of Lords (affirming the judgment of the Court of Session) first examined the language of the will for the purpose of finding its nearest equivalents in the law language of Scotland, and then directed the trustees of the will to give effect to the intention by making a conveyance of the lands in Inverness-shire in liferent and fee to the parties designated, in place of a settlement in "tail-male," a direction which of course could not be literally executed.[1]

Whether the law of the domicile or of the place of execution should prevail.

63. (4.) Considering the numerous decisions on questions of mixed English and Scottish succession which are to be found in the Reports, it is remarkable that there should still be a conflict of authority on the general question, whether the law of the domicile or the law of the place of execution is to prevail in the case of wills expressed in the technical language of the place of execution.[2] The argument in support of the applicability of the law of the domicile may be thus stated:—The *lex loci actus* is of authority to prescribe the mode in which deeds of that country ought to be authenticated, and may therefore be referred to for the purpose of ascertaining whether a settlement is or is not duly authenticated; in other words, whether the deceased died testate or intestate, so far as the instrument in question is concerned. But as regards the interpretation of the deed, a different principle comes into operation. If the maker of the settlement had happened to die intestate, his succession must have been distributed in conformity with the rules of intestate succession of the country of his domicile. Any testamentary settlement he may make is, in truth, a conventional modification of the legal succession, and will naturally fall to be construed by the light of the laws, institutions, and forms of expression peculiar to that nation whose prescribed

[1] A parallel case is *M. of Bute* v. *Lady Bute's Trs.*, 3 Dec. 1880, 8 R. 191. Trustees under a Scottish trust were directed to settle certain moveables as "heirlooms," and it was ordered that the direction should be carried out by deed of settlement in the English form.

[2] As to the interpretation of contracts the greatest diversity of opinion has prevailed; some writers maintaining the application of the *lex loci solutionis*, while others assign to the law of the place of execution the determination both of the meaning and the authenticity of the contract. As regards wills, the method of construction established by the case of *Di Sora* v. *Phillips* (*infra*, Section VIII.) has removed the chief difficulty attaching to this class of questions.

order of succession it is the purpose of the testator to alter. By some such train of reasoning the writers on public law seem to have arrived at the conclusion that the language of testamentary settlements ought to be construed by the *lex domicilii*. But the art of the conveyancer has everywhere set limits to the application of this theory, wills prepared by lawyers being usually expressed in the law language of the territory of execution, without the least regard to the laws or law language of the testator's domicile. Even if it were otherwise, the testator's domicile might be changed subsequently to the execution of the will without implying any corresponding change of testamentary intention. It seems, therefore, more consonant to reason, as it is more convenient in practice, that testamentary instruments should be construed, where construction is required, by the light of the law of the place of execution, and with the assistance, if necessary, of persons skilled in the technical law language of the country.

Limits of the authority of the Court of the domicile.

64. (5.) The most distinct assertion of the authority attributed by our law to the law of the domicile in relation to the construction and effect of wills is contained in the observations of the late Lord President [1] in delivering the judgment of the Second Division in *Purvis' Trustees* v. *Purvis' Executors:*—"The law of the *domicile* of the deceased at the date of his death must determine not only what is the *true meaning and construction and effect* of any will or deed of settlement he may have left disposing of his moveable estate, but also, as regards his moveable estate, whether he died testate or intestate; and if he died testate, the law of the domicile must further determine what paper or papers constitute the will of the deceased. . . . . That the law of the domicile can alone settle what is the will, is a principle of international law of extensive, if not universal, acceptation." We should infer from these observations that, in the case of a difference as to the principles of interpretation between the law of the domicile and that of the place of execution, the former is to be deferred to; but it would be easy to prove from the decisions of the same eminent judge, that this rule, if taken in an absolute sense, is unworkable, and is not followed in practice. The point seems to have been tacitly evaded, or treated in previous cases as matter of compromise.

65. For example, in *Trotter* v. *Trotter*, Lord Lyndhurst, avoiding the difficulty, observed—"A will must be interpreted according to the law of the country where it is made, *and* where the party making the will has his domicile." [2] Equally cautious was the

[1] *Purvis' Trs.* v. *Purvis' Exrs.*, 23 D. 830. See also a later case, *Smith* v. *Smith*, 6 June 1891, 18 R. 1036, where the special circumstances were held insufficient to exclude the operation of the *lex domicilii* as the interpreting law.

[2] *Trotter* v. *Trotter*, 3 W. & S. 415.

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remark of Lord Moncreiff in *Hardman* v. *Rouget's Trustees*, a case of a West Indian will—"Nothing can be clearer in international law than that the construction of a will is to be regulated by the law of the place where it is made, *and* of the domicile of the party who made it."[1] The Lord Ordinary (Lord Jeffrey) had tacitly ignored the difficulty in asserting that "it was indisputable that the radical question, as to who was truly entitled to succeed, must be wholly ruled by the law of the domicile, *or* of the place where the instrument was made."[2]

66. In *Macpherson* v. *Tytler*,[3] where the maker of a settlement in the English form was also the proprietor of a Scottish estate, and therefore in one sense a domiciled Scotsman, the Court took an opinion of English counsel on the construction of the settlement, the ultimate purpose of which was to consolidate into one fund the whole of the testator's fortune and moveables, and lay it out in the purchase of lands in Scotland, which he directed to be entailed. In an English case, *Wylie* v. *Enohin*, where the will was Russian both in respect of execution and of the testator's domicile, the Court of Chancery, on being advised by Russian counsel that their rules of construction, as to the effect of specific in controlling general words of bequest, were similar to those of the English law, decided the case on their own view of the meaning of the will.[4]

Designatio personarum, by what law ascertained.

67. CONSTRUCTION OF SPECIAL CLAUSES.—The particular class or description of persons entitled to take under a general *designatio personarum*—*e.g.*, to "heirs," "next of kin," or the like[5]— ought in principle to be subject to the determination of the same law which regulates the interpretation of the deed; that is, at least in the case of personal property, to the law of the domicile.[6] If in such cases the true meaning is, "I leave my estate, in the event of the failure of my chosen legatees, as the law directs," the reference must be to the law of the testator's last domicile.[7] As regards real property, there is apparently a conflict of opinion as to whether the *lex domicilii* or the *lex loci rei sitæ* ought to prevail.[8] Legacies

[1] *Hardman* v. *Rouget's Trs.*, 4 D. 1508.

[2] 4 D. 1507.

[3] *Macpherson* v. *Tytler*, 19 Jan. 1850, 12 D. 486.

[4] *Wylie* v. *Enohin*, 29 L.J. Ch. 341; and on appeal, 31 L.J. Ch. 402.

[5] *Macharg* v. *Blane*, 1760, M. 4611; *Henderson* v. *Wilson*, 1803, M. 15,953; and see *Earl of Stair* v. *Head*, 29 Feb. 1844, 6 D. 904.

[6] 4 Burge, 590-594: "The ground on which this rule rests is, that as it becomes necessary to ascertain the sense in which the testator has used the expression, and what laws of succession he contemplated, it is presumed that they were those of the country in which he was domiciled, because it must be supposed he was familiar with those laws" (p. 590). See also Story, § 479 (*e*); *Boyes* v. *Bedall*, 33 L.J. Ch. 283.

[7] As to the effect of a change of domicile after the execution of the will, see the opinions in *Brown's Trs.* v. *Brown*, 1890, 17 R. 1174. It was found not to be necessary to give a decision on the general question of the effect of such a change.

[8] De Chassat, Tr. de St. p. 424, de-

Currency.

are held to be payable in the currency of the country in which the testator was last domiciled, unless the testament affords clear evidence that the testator meant another currency.[1] And the rule is not varied by the circumstance that the legacy is to be paid out of the proceeds of real estate situated in a country where the currency is different from that of the domicile.[2] According to the rules established by the Court of Chancery, legacies and shares of succession bearing interest carry the interest current in the state in which the assets have been placed by the executors or administrators from the dates when they became payable. This would also appear to be the doctrine of the law of Scotland.[3]

Interest.

Words importing discharges of legal provisions.

68. With reference to words of discharge or renunciation of legal claims in a foreign deed forming part of a general scheme of testamentary disposition, the question may arise whether such words import an exclusion of legitim,[4] of *jus relictæ*,[5] or of terce.[6] In the two former cases the law of Scotland, the *lex domicilii*, under which these legal provisions are created, pronounces that they cannot be discharged by implication; but the question whether they are expressly discharged by appropriate words can scarcely be said to pertain to any system of law, being truly a question of the interpretation of ordinary language, in which no rule of law is involved. In regard to terce, the law of Scotland, the *lex loci rei sitæ*, determines that it may be satisfied by a conventional provision in a foreign settlement, without words of express discharge.

Jus accrescendi and vesting.

69. The *jus accrescendi* under a testament depends on its being conferred or refused by the law of the *situs* if the property be immoveable, and by that of the domicile if it be moveable.[7] And the same law will determine the correlative question whether a legacy has lapsed by the predecease of the legatee.[8]

cides for the application of the laws of the *situs*, contrary to the opinions of Burge (*ut supra*, citing Voet, 28, 5, 16; Sande, 4, 7, 7; 2 Boullenois, 419, &c.); of Story, § 479 (*h*); and of Fœlix and Demangeat, § 115, 4ème ed., i. 262.

[1] Burge, iv. p. 594, and authorities cited; Story, § 479 (*b*); *Saunders* v. *Drake*, 2 Atk. 465; *Pierson* v. *Garnett*, 2 Br. C.C. 39, 47; *Malcolm* v. *Martin*, 2 Br. C.C. 50.

[2] Burge, *ut supra*, and authorities there cited. See particularly 2 P. Wms. 88; 1 P. Wms. 696; 2 Bligh, P.C. Ca. 89; 2 Atk. 465.

[3] *Graham* v. *Keble*, 19 July 1820; 6 Pat. 616; 14 July 1830, 4 W. & S. 166; *M'Innes* v. *M'Allister*, 29 June 1827, 5 Sh. 862, N.E. 801; 23 June 1830, 4 W. & S. 142; *Palmer and Co.* v. *Glass*, 24 Jan. 1835, 13 Sh. 308. See also *Price* v. *Wise*, 8 Feb. 1862, 24 D. 491.

[4] *Breadalbane's Trs.* v. *Marchioness of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377; *Keith's Trs.* v. *Keith*, *infra*.

[5] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040.

[6] *Countess of Seafield* v. *Earl of Seafield*, 8 Feb. 1814, F.C.; *Nisbett* v. *Nisbett's Trs.* 24 Feb. 1835, 13 Sh. 517, and cases of *Jankouska* and *Ross*, cited *infra*, Chapter VII., Section IV., where the subject of the discharge and satisfaction of legal claims is specially treated.

[7] 4 Burge, 581, citing Mattheus, 18, § 26, and Vasq. tom. 2, p. 312.

[8] Burge, *ut supra*; *Anstruther* v. *Chalmers*, 2 Sim. 1. Accordingly the Court

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Tendency of the modern law to restrict the operation of the *lex domicilii*.

70. The tendency of the more recent decisions has been to confine the operation of the *lex domicilii* within narrower limits than were at one time assigned to it. The principle established by the cases of *Leith* v. *Leith* and *Purvis' Trustees* v. *Purvis' Executors*, and subsequently recognised by the Act of 1861, assigns to it only a joint operation with the law of the place of execution in regard to the requisites of authentication.[1] The cases of *Rainsford*, *Cameron*, and *Norton* have restricted its operation in cases where the language of the will is not that of the domicile; and the case of *Marjoribanks* is a direct precedent for its exclusion in questions as to the administration of continuing trusts.[2] In *Thomson's Trustees* v. *Alexander*,[3] the jurists of both countries were agreed that resort to its expositors was unnecessary in the case of wills expressed in popular language, a principle which is now definitely established. Although, in a case already noticed,[4] a trust was held to be unlawful in deference to the special and exceptional provisions of the law of the domicile, it must be admitted that there is force in the view stated by the dissentient judge, that the question of the lawfulness of a will is one of public policy, which ought to be determined by the law of the place where the will is to be carried into effect, rather than by that of the locality where it was made.

SECTION IV.

Administration of the Succession.

Division of the subject.

71. This subject embraces a wide range of inquiry. In a great variety of cases connected with the law of trustees and executors, the rules of law admit of being modified by international relations. Special cases, however, are best treated in connection with the relations of law to which they belong; and, referring the reader for such to the body of the work, we shall confine this section to a brief enunciation of principles. The points to be noticed are these: 1*st*, *Aditio hæreditatis* and Title of Administration; 2*dly*, Responsibility of the Trustee or Executor, and Diligence Prestable; 3*dly*, The Liabilities of Estates situated in different countries.

Vesting of the succession or beneficial interest.

72. (1.) The most general rule in relation to the vesting of moveable succession is, that the inheritance vests in accordance with the law of the domicile; but that the law of the *situs* has

of Chancery has sent several cases under the Law Ascertainment Act to the Court of Session, as the court of the domicile, upon the question whether certain legatees took vested interests under a will; see *Lord* v. *Colvin*, 15 July 1865, 3 Macph. 1083; *Mitchell* v. *Mitchell*, 17 March 1865, 3 Macph. 721.

[1] *Supra*, §§ 51-55.

[2] *Supra*, §§ 61-65.

[3] § 60.

[4] *Boe v. Anderson*, 24 D. 742.

authority to determine whether any special title of possession or *aditio hæreditatis* be requisite to vest the specific estate.[1] As to immoveable succession, it is entirely within the cognisance of the law of the *situs;* so that if a person succeeded as heir of provision to heritable estate in Scotland, and also to real estate in England, the latter vested immediately, while under the common law of Scotland the vesting of the heritage remained in suspense until the heir had exercised his right of taking it up by service.[2] So also in relation to moveable succession which accrued before the passing of the Act of Geo. IV., the character of executor attached by survivance; and although the moveable estate in Scotland did not vest without confirmation, yet as to effects in England,[3] and other parts of the world,[4] no proceeding for vesting the right was required either by the law of Scotland, or of the country where the effects were locally situated. On the law of the domicile will depend the effect of the acquisition of a vested right—*e.g.*, in the case of succession accruing to a married woman, whether it wholly falls under the *jus mariti*,[5] or whether the legatee is entitled to have a provision made for her out of the fund in a question with the husband's creditors.[6]

Vesting of the legal estate in the executor or administrator.

73. A similar distinction prevails between the general right of inheritance and the right to the specific subjects, with reference to the completion of titles of administration by executors and administrators. In every country with whose systems of law we are acquainted, some official act is required, analogous to probate or confirmation, to clothe the executor with a title to administer. It belongs to the court of the domicile to decide between competitors

[1] The rule is somewhat differently stated by Burge :—" The title by succession to moveable estate being governed by the law of the testator's domicile, and to immoveable property by that of its *situs*, the obligation imposed on the heir of adiating or accepting the succession for the purpose of perfecting his right, and investing him with the active title of heir, would be dependent on the laws which respectively regulate the succession to these two species of property " (4 Comm. 640). We cannot concur in the suggestion that the necessity of adiation depends on the law of the domicile. It may well be that the laws of the *situs* in which possession of the estate must be taken have no machinery for vesting a title in solemn form. In such a case, possession *via facti* is the only mode of completing a title of which the case admits.

[2] And where, by the law of the domicile, probate is necessary to render a will admissible in evidence, this rule is not binding upon the court of administration, which may, on the contrary, proceed upon the original will, or such evidence of its contents as its rules of evidence require; *Yeats* v. *Thomson*, 5 June 1835, 1 S. & M'L. 795.

[3] *Craigie* v. *Gairdner*, 12 June 1817, F.C. ; *Egerton* v. *Forbes*, 27 Nov. 1812, F.C. ; *Milligan* v. *Milligan*, 9 Feb. 1826, 4 Sh. 432, N.E. 438.

[4] *Smith* v. *Lauder*, 30 May 1834, 12 Sh. 646.

[5] *Clarke* v. *Newmarsh*, 13 Feb. 1836, 14 Sh. 488. *Per curiam* in *Lashley* v. *Moreland*, 21 Dec. 1809, 15 F.C. 468.

[6] *Duchess of Buckingham* v. *Winterbottom*, 13 June 1851, 13 D. 1129.

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for the office of executor, and to appoint to the office where the testator has omitted to do so; but the law of the *situs* of the executry estate is entitled to require the executor administering to it to confirm his title within its territory, and to give such security as may be requisite.[1] The rule, more briefly expressed, is, that the *petitio hæreditatis* is to be brought in the *forum domicilii;* the *petitio rerum singularum* to be brought in the *forum rerum sitarum.*[2]

Ancillary administration.

74. In Scotland it seems to have been the practice from time immemorial to grant confirmations as of course to *executors* who had previously proved the will in England or in a foreign jurisdiction; but the title of an *administrator* appointed by a foreign court was not recognised as a matter of course.[3] This practice was corrected in the case of *Hastings*,[4] where the true international principle was, for the first time, expounded by the Lord Justice-Clerk Hope. The administration, he observed, was to be that of the domicile; and where moveable funds were collected in a foreign country for distribution, they ought to be sent to the executor appointed by the judge of the domicile, who alone had a proper title of administration. This had long been recognised in the case of executors to whom probate was granted; "but," said his Lordship, "letters of administration are a title just as probate is, and when produced here are equally authoritative as a warrant for granting confirmation."[5] The granting of auxiliary confirmation is now regulated by statute.

[1] *Preston* v. *Lord Melville*, 29 March 1841, 2 Rob. 88, reversing 16 Sh. 472; see Lord Cottenham's *dictum*, distinguishing between the right of succession and that of administration, p. 105. A will proved in the *forum rei sitæ* may nevertheless be afterwards found invalid by the law of the testator's domicile; see *Thomson* v. *Carling*, 8 Sim. 310, where the question arose with reference to the restraints on the testamentary power imposed by the law of France, which was the testator's domicile.

[2] See this distinction explained, with reference to the enactments of the Civil Law upon which it is founded, by Savigny, Droit Rom. § 376, ed. Fr. tom. 8, p. 305. The right of suing intromitters with subjects forming part of a succession in the courts of the *situs rei*, was given by Nov. 69, cc. 1 and 3, which are general enactments comprehending the case in question. See also Bar, Int. Recht, § 113.

[3] See the information furnished to the Court in the case of the *M. of Hastings*, *infra*.

[4] *Marchioness of Hastings* v. *Marquis of Hasting's Exrs.*, 10 Feb. 1852, 14 D. 489.

[5] 14 D. 491. As to the duty of the *forum rei sitæ* to grant ancillary administration to the executor or administrator authorised by the *forum domicilii*, see the opinions of the Law Lords in *Enohin* v. *Wylie*, 31 L.J. Ch. 404. As to the course of administration, there was a difference of opinion. Lord Westbury affirmed that, in all cases, the assets ought to be sent to the domicile to be there distributed either extrajudicially, or, if needful, under the direction of the court of the domicile. He thought great confusion would arise where a testator leaves personal property in different countries, if an appeal should be made to the courts of each to construe the will, with a view of distribution of the estate in terms of it. Lords Cranworth and

Probate and Letters of administration equivalent to a license to sue.

75. Prior to the passing of the Confirmation and Probate Act, 1858, it was ruled that probate or letters of administration were equivalent to a license to sue in the Scottish Courts; the debtor, however, being entitled to insist on confirmation before extract.[1] Under the present law an executor founding on an English title would, before extract, procure an indorsation of the probate or letters of administration from the Commissary (now the Sheriff) in Scotland.[2] In like manner, the title of a Scottish trustee suing in England or Ireland may be perfected by registration of the extract of confirmation in the Court of Probate.[3]

Title of executor a good title to discharge *jure gentium*.

76. The executor or administrator appointed by the deceased person, or by the jurisdiction of his last domicile, as the case may be, has a title *jure gentium* to ingather and distribute the moveable estate of the deceased. Payment to him is a good acquittance to debtors, all over the world. Accordingly, debtors in Scotland who had paid to the English administrator of the estate of a domiciled Englishman, were held not liable in second payment to a person who had confirmed executor-creditor on the Scottish estate.[4]

Competitions of diligence between heirs and creditors regulated by court of the *situs rei*.

77. In virtue of its exclusive authority in the matter of the *petitio rerum singularum*, it is the province of the court of the *situs* of moveable property to determine all competitions between competing executors or executor-creditors,[5] as well as questions of competition of diligence between executors and others claiming the estate.[6] Similarly, all questions of priority of diligence, or other real rights to immoveable estate, are subject to the determination of the law of *situs*.[7]

Executor primarily responsible to the court of the domicile.

78. (2.) The primary responsibility of an executor is to the court of the domicile from which his authority is derived; and the diligence prestable by him is that which is exacted by the law of the domicile. Where an executor, or judicial factor, or receiver, is appointed by the judge of the place where the fund is situated for

Chelmsford, on the contrary, held that the courts of the *locus rei sitæ*, having (on the authority of *Preston* v. *Lord Melville*, 2 Rob. 88) jurisdiction, were bound to exercise it when appealed to, unless it could be shown that inconveniences would arise. See *infra*, Section VII. (Jurisdiction).

[1] *Clark* v. *Brebner*, 1759, M. 4471; *Wardlaw* v. *Maxwell*, 1715, M. 4500; *Fraser* v. *Johnston's Trs.*, 11 July 1821, 1 Sh. 120-2; *Stewart* v. *Macdonald*, 21 Nov. 1826, 5 Sh. 27-9, and cases in M. *voce* "Foreign," pp. 4497-4500. The Courts of England and America require probate within their own jurisdictions as a title to sue; *Price* v. *Dewhurst* (Eng.), 4 Myl. & Cr. 76, 80; *Campbell* v. *Sheldon* (Amer.), and other cases cited in Story, 6th ed. § 479 (*o*).

[2] 21 and 22 Vict., cap. 56, § 14.

[3] *Id. Stat.* §§ 12, 13.

[4] *Hutchison and Co.* v. *Aberdeen Banking Co.*, 9 July 1837, 15 Sh. 1100.

[5] *Veitch* v. *Irving*, 1700, 4 Br. Sup. 495. See on this subject, Chapter XLIX. (Office of an Executor).

[6] *Clarke* v. *Edgar*, 1810, Hume, 175; *Smith's Trs.* v. *Grant*, 27 June 1862, 24 D. 1142.

[7] *Scott* v. *Allnutt*, 10 Sept. 1831, 5 W. & S. 416.

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the realisation and custody of the estate, it would seem that such executor is discharged by paying over the fund to the executor or administrator having a title from the jurisdiction of the domicile.[1] The determination of the Court of the domicile in an administration suit is at once an exoneration to the executor who makes and a title to the beneficiary who receives payment of a legacy or share of succession in virtue of its decree; and the *forum rerum sitarum* will not thereafter entertain the question of right, but will give judgment in conformity with the decree.[2]

Investment in foreign securities.

79. Executors or trustees who are responsible to the Court of Session ought to be cautious about investing in foreign securities, as they may render themselves personally responsible if the jurisdiction of that Court over the fund is ousted by the interference of the court of the *situs*. The fact of the assets having been recovered in a foreign country will not release the executor who has recovered them from his obligation to account to the court of the domicile; for, as we have already seen, it is his duty to transmit the funds without delay to the domicile, as the principal forum of distribution, and not to allow the administration of the estate to be subjected to a divided responsibility.[3] As the completion of a title of administration to special subjects is regulated by the *lex loci rei sitæ*, that law also will determine the measure of responsibility for vitious intromission without a title.[4]

[1] Story, 6th ed., § 491 (*b*), and case of *Parsons*, there cited; *Marchioness of Hastings* v. *Marquis of Hastings' Exrs.*, 14 D. 489, per Lord Justice-Clerk Hope. This point must be held to be ruled by the strictly analogous case of curators and guardians appointed by the respective courts of the *situs* of the property for its administration. In such cases the application of the funds falls to be made by the guardian of the ward's domicile, who has the control of his person; and the Court of Session, when exercising the functions of the court of the *situs* of the estate, is in use to authorise the payment of the necessary funds to the guardian of the ward's domicile or resi dence; *Murray* v. *Baillie*, 24 Feb. 1849, 11 D. 710; *Allen* v. *Robertson*, 24 Nov. 1855, 18 D. 97. In special cases the authority of the Court of the domicile is required; *Laing* v. *Robertson*, 21 June 1859, 21 D. 1011. The practice of the Court of Chancery is similar in relation to funds under its control, and falling to be applied in Scotland by a curator or judicial factor; *Mathieson, petr.*, 26 June 1857, 19 D. 917; *re Johnston*, 4 Hagg. 182.

[2] *Brown's Trs.* v. *Brown*, 3 March 1830, 4 W. & S. 28; *Crispin* v. *Doglioni*, 3 Sw. & Tr. 96; and see Williams on Exrs., 8th ed., 376. In the case of the *M. of Breadalbane* v. *M. of Chandos*, 7 L.J. Ch. 28 (also in 2 S. & M'L. 402), an attempt was made to restrain the execution of a decree of the Court of Session, finding a claimant entitled to legitim (see the case in 2 S. & M'L. 377), and to obtain a re-hearing in the Court of Chancery upon different grounds. Lord Cottenham dissolved the injunction which had been granted by the Vice-Chancellor, as being contrary to international law.

[3] *Acct. of Court* v. *Geddes*, 29 June 1858, 20 D. 1174; *Fergusson* v. *Menzies*, 21 May 1830, 8 Sh. 782; *Simpson* v. *Doud*, 1 Feb. 1855, 17 D. 315.

[4] *Fischer* v. *Earl of Seafield*, 24 May 1822, 1 Sh. 435, N.E. 404; *Lord Dingwall* v. *Vandosme*, 1619, M. 4449.

Rules in relation to diligence prestable by trustees and executors.

80. As to the diligence prestable by trustees and executors, the rules of equity of almost all civilised countries are substantially identical, being founded on the Civil Law ; and it is scarcely possible that a case can arise in which a court of competent jurisdiction would be controlled by foreign law in the enforcement of responsibility as for a due administration. Nevertheless, in such cases the Court of Session is so far guided by considerations of expediency or competency, that it will not allow an action to proceed against a cautioner in Scotland until the question of his liability has been investigated by the jurisdiction to which the cautioner gave his security.[1] Trustees of heritable estate in Scotland are not only subject to the jurisdiction of the Court of Session *ratione rei sitæ*, but the measure of their responsibility is determinable by that court according to the law of the *situs*, and without reference to that of the domicile.[2]

Order of liability of the real and personal estates.

81. (3.) On the subject of the order of liability of estates situated in different countries for debts and legacies, reference is made to the subsequent chapter on this subject, where the cases involving international relations of law are separately considered.[3] References to the foreign authorities will be found in the works of Burge and Story.[4]

SECTION V.

ELECTION.

Election regulated by the *lex domicilii*.

82. In the application of the principle of the right of election between legal and testamentary provisions, the principle, by whatever denomination it is known, is strictly confined within the limits assigned to it by the law of the domicile.[5] The function of putting the heir to his election is evidently one of those paramount and overruling relations of law by which the conflicting claims of successors of different orders are reconciled, and which therefore can only pertain to that law which takes cognisance of the succession as a whole. To suppose that any other court than that of the domicile was competent to decide a question of election, were to introduce hopeless confusion into the international relations of succession. In one of the first cases of this description that came before the Court of Session, the Lord Ordinary (Glenlee), in respect the testator was domiciled in India, directed a case to be laid

[1] *Leith* v. *Hay*, 17 Jan. 1811, F.C. ; *Anderson* v. *Borthwick*, 30 June 1827, 5 Sh. 879, N.E. 816.

[2] *Blacket* v. *Gilchrist*, 30 May 1832, 10 Sh. 590 ; and see *Bain* v. *Shand*, 8 June 1833, 11 Sh. 688 ; 31 Jan. 1839, 1 D. 439.

[3] Chapter LXX., *infra*.

[4] 4 Burge, Comm. pp. 722 *et seq.* ; Story, Confl., §§ 489(*a*)-489(*c*).

[5] 4 Burge, 733'; Story, § 479 (*a*).

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before English counsel for their opinions on the question,—Whether the heir-at-law could take certain subjects at Calcutta and Simla, and at the same time claim a legacy bequeathed by the ancestor's will? And the report bears that the Court, on a reclaiming petition, being clearly of opinion that the law of England must decide the case, "refused to listen to any argument founded on the law of Scotland." [1]

Application of the principle.

83. Where the Court of Session, in distributing the moveable succession of a testator who was last domiciled in Scotland, is called upon to consider the intention manifested by the testator with respect to immoveable estate not effectually disposed of, it will be guided by the rules of the Scottish law of approbate and reprobate, and that whether the immoveable estate is situated in Scotland or in a foreign country.[2] If the same succession should fall to be distributed by a foreign Court, that Court would, to the same extent, necessarily be guided by the rules of the law of Scotland. Where, again, the testator dies domiciled in England, the English law of election is applicable, without regard to the *situs* of the property, or to the forum of distribution.[3]

84. Thus, in the case of *Dundas* v. *Dundas*,[4] where a testator domiciled in Scotland had included in his trust-settlement an English estate of considerable value, but the conveyance was ineffectual according to the law of England because it was not authenticated by three witnesses, this property having been claimed by W. D., the heir-at-law, who was also entitled under the settlement to a share of the Scottish real and personal estate, the Court of Session were of opinion that they were bound to deal with the English property under the Scottish law of approbate and reprobate, and accordingly found "that if W. D. shall ultimately take the estate situated in England without surrendering the same for the purposes of the trust, he cannot be entitled to claim, under the trust-deed, any share of the heritable or moveable estates in Scotland thereby conveyed to the trustees."[5] In moving the affirmance of this judgment, Lord Brougham observed,—"The Court of Session have done nothing more to affect the real estate within the liberties of Berwick than the Court of Chancery would do in the case I have put. They have only said,—You come to us, not for the real estate, not to decide on the real estate in England, which we have

[1] *Wightman* v. *Delisle's Trs.*, 1802, M. 4479. See *Martin* v. *Martin*, 17 June 1795, 3 Pat. 421.

[2] *Dundas* v. *Dundas*, *infra*; *Alexander* v. *Bennett's Trs.*, 1 July 1829, 7 Sh. 817.

[3] *Murray* v. *Smith*, 4 March 1828, 6 Sh. 690; *Wightman's* case, *supra*; *Trotter* v. *Trotter*, 3 W. & S. 407; *Robertson* v. *Robertson*, 16 Feb. 1816, F.C.; *Campbell* v. *Munro*, 15 Sh. 310.

[4] *Dundas* v. *Dundas*, 14 Jan. 1829, 7 Sh. 241; 22 Dec. 1830, 4 W. & S. 460.

[5] 4 W. & S. 462.

no power to do; but you come to us as a legatee—you want to enjoy your fourth share under the will of the personal funds, and the heritable funds in Scotland: we have jurisdiction over them, and we put you to your election—either take the whole according to the principles of the Scottish law, or reject the whole; take the legacy *cum onere*, or reject both the burden and the legacy."[1]

To what extent the foreign jurisdiction may deal with Scottish heritable estate.

85. The right of the Courts of England and Scotland so to deal with the personal claims of heirs of real estate situated in the other country is mutually acknowledged. For example, in the case of *Lamb* v. *Montgomerie*,[2] where certain heritable estate in Scotland had been treated as personalty in an English will, the Court of Chancery, dealing with the Scottish property under the English law of election in a suit instituted for the administration of the trust, obliged the heir-at-law to recognise the conveyance as a condition of his claiming a share in the personal succession. The Court of Session had in the meantime appointed a judicial factor on the heritable estate; and thereafter a petition having been presented by the executors, praying that the judicial factor might be authorised to dispone the said heritable property to them in trust, for the uses, ends, and purposes specified in the said will, Lord Kinloch remitted to English counsel for their opinion,—Whether the proceedings in England were competent and regular, and imported a final and irrevocable election on the part of the heir (a minor) of the provisions under the will; and whether, in respect of such election, he was obliged to make over the heritable property to the executors? Having obtained an affirmative answer, the Lord Ordinary authorised and empowered the judicial factor to execute a conveyance in favour of the executors as desired.

English law of election applied to determine rights under a will disposing of heritable estate.

86. In an earlier case, relating to a will executed in India, and which indicated an intention (not effectually expressed) to convey heritable estate in Scotland, the Court of Session sent a case to English counsel for their opinion upon the construction of the will, in which, *inter alia*, the following question was put:—If the will be not sufficient to pass real property, does it so express the testator's intention that it would put the heir to his election in any competent Court in England, whether of law or equity, if he had claimed the English real property as well as his share of the personal estate under the will? On obtaining an opinion that the will did *not* so express the testator's intention as that it would put the heir to his election in a court of equity in England, the Court found the heir entitled to a legacy out of the personal estate, without obliging him to communicate the heritage.[3]

[1] *Dundas* v. *Dundas*, 4 W. & S. 466.

[2] *Lamb* v. *Montgomerie*, 20 July 1858, 20 D. 1323. See *Loudon* v. *Loudon*, 1811, Hume, 23, and relative note, contrasting this case with *Wightman* v. *Delisle*, M. 4479.

[3] *Trotter* v. *Trotter*, 5 Dec. 1826, 5 Sh. 78; 10 June 1829, 3 W. & S. 407; and

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Heir not put to an election where a bequest is *null*.

87. The supereminent authority of the Court of the domicile to determine the conditions and validity of elective claims is further illustrated by the case of *Hewit's Trustees*.[1] The testator, who was survived by a widow and one child, by his will directed his trustees to pay certain legacies, and in the event, which happened, of his child dying without issue, he bequeathed the residue of his estate, inclusive of real estate in England, to charitable institutions named by him, to be divided according to the discretion of his trustees. In consequence of the law of Mortmain, it was found by a judge of the High Court of Justice, under a remit from the Court of Session, that the charitable bequests were null, in so far as directed to be paid out of the proceeds of the freehold and leasehold estates, and that, even in the event of the right of the heir or personal representatives being waived, the said freehold and leasehold estates would not, according to the law of England, fall to be distributed in the terms of the settlement, but would be treated as undisposed of. It was held by the Court of Session, being the Court of the testator's domicile—(1) that the heir was not put to an election between the legacies bequeathed to him and the right of inheritance in England; and (2) that the question whether the real estate in England was chargeable with a proportion of the testator's debts, legacies, and charitable bequests, was a question for the Court of the domicile, and this question was reserved for future consideration. It was observed, "The question whether the heir is put to his election is a question involving the construction and effect of the will as an expression of the mind of the testator, and is therefore a question for the Court of construction,—the Court which has jurisdiction over the will in its entirety. This is a point which has perhaps only a theoretical interest, because, undoubtedly, the Courts of England and Scotland have professed to treat such questions on common principles; and in the Court of last resort, the decisions of the English and Scottish Courts in questions of election have been cited indifferently in illustration of the principles which regulate this chapter of the law."[2]

SECTION VI.

Revenue Laws.

Distinction as to probate or inventory duty and legacy duty.

88. With respect to the law which ought to regulate the payment of duties to Government on testaments and successions, the

see *Robertson* v. *Robertson*, 16 Feb. 1816, F.C.; *Murray* v. *Smith*, 4 March 1828, 6 Sh. 690; *Campbell* v. *Munro*, 23 Dec. 1836, 15 Sh. 310.

[1] *Hewit's Trs.* v. *Lawson*, 1891, 18 R. 793.

[2] 18 R. 803.

Legislature of Great Britain imposes duties on probate or administration (in which category inventory duty is included), and duties on legacies or shares of succession. The former are payable according to the *lex loci* of the assets at the death of the testator or intestate. The latter are payable according to the law of the domicile, and into the exchequer of the country where the deceased person was domiciled, wherever the legatees or successors reside. This point, so far as relating to legacy duty, is ruled by the decision of the House of Lords in the case of *Thomson* v. *The Advocate-General*.[1]

Incidence of the succession duties.

89. After some conflicting decisions, it is now finally settled by a judgment of the Court of Appeal in Chancery that succession duty, under the Act of the present reign, is not payable on legacies of money or personal estate given by the will of a person domiciled in a foreign country.[2] Such duty is payable on all real estate within the kingdom, without respect to the domicile of the deceased proprietor.[3]

SECTION VII.

Jurisdiction and Forum Conveniens.

Paramount jurisdiction of the forum of the trust-estate.

90. First in order and in importance is the jurisdiction to be exercised in relation to the subject of a succession or a trust in an action directed against executors or trustees. Having regard to the current of authority on such questions, and also keeping in view the distinction which it is sometimes necessary to take between international law in general and the forms and conditions of its local application, it must be admitted that the grounds of jurisdiction in the matter of the execution of a trust cannot be reduced to a single category or head. The principle of private international law, according to which jurisdiction is most usually exercised by the Court of Session in actions directed against a body of trustees, was expressed by the writer in terms which were approved by the Court in subsequent cases:[4] "Where a trust is constituted in Scotland, and is to be executed in Scotland, the

[1] *Thomson* v. *The Adv.-Gen.* 18 Feb. 1845, 4 Bell 1, reversing 3 D. 1309; and see the separate Reports of Exchequer Cases in Scotland; also *Comrs. of Inland Revenue* v. *Gordon's Exrs*, 2 Feb. 1850, 12 D. 657; *Adv.-Gen.* v. *Lamont*, 29 May 1857, 19 D. 779. The older authorities are discussed in Jarman on Wills, 5th ed., pp. 2, 3, note.

[2] *Wallace* v. *Att.-Gen.*; *Jeves* v. *Shadwell*, 1 Law Rep. Ch. Ap. 1. In *Littledale's Trs.* v. *Lord Advocate*, 1882, 10 R. 224, it was held by the Lord Ordinary that succession duty was payable in respect of the children's interest in bonds of provision secured over a Scottish trust-estate, the beneficiaries being admittedly domiciled in the United States of America.

[3] *Ibid.*

[4] See *Robertson's Tr.* v. *Nicholson*, 1888, 15 R. 920; *Ashburton* v. *Escombe*, 1892, 20 R. 196.

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Supreme Court of this division of the United Kingdom has jurisdiction over the whole subject-matter of the trust, including in that expression not only the interpretation of the trust, but the duty of making provision for its continuance, and the power in cases of negligent administration of calling the trustees to account. . . . The obligation of trustees to account for their administration is one and indivisible, and is in general to be enforced by an appeal to the courts of the country in which that obligation is to be fulfilled, and where the trust is to be executed."[1] Whether the right of action against trustees be regarded as the enforcement of the contract implied in the acceptance of a trust, or whether it be referred to the real right which the beneficiary has in the estate held in trust for him, in either view it is consistent with the known principles of jurisdiction that the body of trustees should be answerable to the Courts of the country where the trust is made and is to be executed ; and, as observed in the case cited, it would be mischievous in the extreme if it were held to be necessary, in order to vindicate a trust right, that separate action should be taken against the different members of the trust in the different British or foreign territories in which the trustees might be resident for the time. In this question, the jurisdiction is independent of the purposes or legal character of the trust ; and the forum of the trust may always be appealed to for the purpose of executing or compelling the execution of the trust, whether the objects be the wife and children of the truster, as in the case of *Kennedy*, or his creditors, or the truster himself, as in the cases of *Robertson's Trustee* and *Ashburton*, cited above. The case of an executor who has taken out confirmation in Scotland is no exception to, but a typical case illustrative of the rule ; and, following the cases cited, Lord Kyllachy sustained the jurisdiction in an action of accounting against the two testamentary trustees of a defunct who had confirmed to the estate in Scotland, one of these trustees being resident in Ireland, and the other in the United States of America.[2] But here a distinction must be taken between confirmation, probate, or *aditio hæreditatis* in the Court of the domicile of the testator, and such auxiliary confirmation, or the like, as is necessary for obtaining possession of assets in the territory where these are situated. In the case of a confirmation of limited estate, and obtained for a limited purpose, it can hardly be doubted that the defence of *forum non conveniens*, if stated, would be sustained by our Courts, assuming that the facts of the case were consistent with such a defence. If, on the contrary, it appeared that Scotland was the principal domicile of the deceased, and the seat of his fortune

[1] *Kennedy* v. *Kennedy*, 1884, 12 R. 275. [2] *M'Gennis* v. *Rooney*, 1891, 18 R. 817.

and affairs, it would apparently be no defence to an action against his executors, that the Courts of another part of the empire had undertaken the judicial administration of the trust, and that the confirmation in Scotland only attached or vested in the executors a small part of the personal estate.[1]

Jurisdiction of the Court of the domicile considered.

91. It has generally been assumed that in the case of a testamentary trust the Court of the domicile, as such, has jurisdiction to administer the trust, or, as it may otherwise be expressed, to compel the due administration of the trust in an action or suit directed against the trustees. It is, of course, very convenient that a court which has exclusive cognisance of the law governing the succession and the interpretation of the testamentary instruments should have the power of giving effect to its decisions on such questions on the demand of the parties interested; and where the domicile of the testator and the *locus* of the constitution of the trust are identical, as they usually are, no difficulty will arise. But a testator may have changed his domicile after the execution of his will, and in such a case it appears to the writer that it would be open to the persons interested to take action against the trustees, whether for the purpose of obtaining an authoritative interpretation of the will, or for the purpose of enforcing the trust in the Court of the domicile, the confirmation or probate necessarily taken in the domicile being a sufficient ground of jurisdiction against the trustees who confirm, and warranting, in respect of their interest in the matter of the suit, the citation of the other trustees. In his comprehensive discussion of the law of jurisdiction over trusts in a case which will be immediately considered,[2] Lord Selborne touches on this point; but it is not quite clear to which side of the question his high authority inclined. We shall quote two passages in which a distinction is inferentially drawn between principle and practice in such cases. "It has never been held that the forum in which such rights (*i.e.*, rights of succession) may be vindicated depends on the domicile (as distinguished from the place of residence for the time being, which is sometimes inaccurately so denominated) either of the plaintiff or the defendant in any action or suit; and if the domicile of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected, or those liabilities enforced, can necessarily depend upon the domicile of the deceased. Lord Westbury did, indeed, in the English case of *Enohin* v. *Wylie*,[3] express an opinion (unsupported, so far as I can see, by any other authority, and inconsistent, as I

[1] *Brown* v. *Stirling-Maxwell's Exrs.*, 1883, 10 R. 1235.

[2] 13 R. (H.L.) 5 (*Orr-Ewing* case).

[3] 10 H.L. Ca., at p. 13.

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read them, with the general tenor both of the English and of the Scottish, and even of the American authorities) to this effect, that 'the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the assets of an intestate, are required to resort.'" Lord Selborne then points out that this opinion was not concurred in by the other judges who took part in the decision. But Lord Selborne apparently does not mean, in the passage cited, to affirm anything more than that the domicile is not a *necessary* and unique ground of jurisdiction with respect to wills and succession, and this is made clear by a subsequent passage, where, in criticising the opinion of Lord Mure in the case appealed from, he uses this language: "I can hardly suppose Lord Mure to have understood either Lord Cranworth or Lord Cottenham as meaning to exclude (contrary to the general current of English authorities) the power of the Courts of the domicile, at all events, to make a general decree for the administration (in the third sense above explained) of the whole estate of any testator or intestate who might have died leaving assets in several states or countries, in respect of which several grants of probate or administration (whether principal or ancillary) might have been obtained, working out such a decree in the best way practicable as to assets not within the local jurisdiction." [1]

Jurisdiction *in personam* in actions against trustees.

92. So much for the more general grounds of jurisdiction in relation to successions, trusts, and their administrators. As regards other grounds or sources of jurisdiction, it is probably correct to say that the mere circumstance that a fiduciary or beneficiary interest is asserted by a pursuer or defender does not displace the ordinary methods of determining jurisdiction, and that accordingly a pursuer may maintain his right to bring his case before the Courts of Scotland on any of the special grounds on which jurisdiction might be maintained if no fiduciary relation had subsisted between the defender and himself. But this theoretical extension of the sphere of action of the Courts in trust cases is largely modified through the operation of the principle known as *forum conveniens;* and it is the less necessary to dwell on the cases illustrative of real and personal jurisdiction, because, in Scotland at least, these more limited grounds of judicial intervention are for the most part in abeyance, and are only liable to be called into action in cases of emergency, or where justice cannot readily be obtained in the *forum concursus* to which all the parties concerned are under obligation to submit their claims.

Jurisdiction *in rem.*

93. Briefly stated, the special jurisdiction may be either *in rem*

[1] *Orr-Ewing* case, July 24, 1885, 13 R. (H.L.), at p. 7; affg. 11 R. 600, 682.

or *in personam*. If the subject of the succession be heritable estate in Scotland, that will of itself give the Courts of Scotland jurisdiction *in rem*;[1] and with respect to moveable estate it would seem that the confirmation of executors in Scotland to estate situated there is a sufficient foundation for the exercise of jurisdiction *in rem* against executors, although not at the time within the territory of the judge.[2] But the mere appointment of an executor-dative by the Commissary or Sheriff, not followed by confirmation, will not have the effect of subjecting the executor to the jurisdiction of the Court of Session in the matter of the succession.[3]

Jurisdiction—In relation to personal property.

94. The Court of Session has jurisdiction *in personam* for the enforcement of the administration of the estates of persons deceased where the trustee is within the territory, and an action is brought against him at the instance of some party having an interest.[4] The Court has also the power of enforcing the administration of trusts and obligations relating to foreign lands, where the trustee, by residence or otherwise, is subject to its personal jurisdiction.[5] The jurisdiction of the Court of Session over the person of a trustee, executor, or residuary legatee, resident in Scotland, is analogous, in its origin and in its effects, to that which is exercised over any ordinary debtor.[6] But a foreigner cited in an action of transference as the representative of a deceased defender is not, on that ground, necessarily subject to the jurisdiction.[7]

—In relation to trusts of lands.

Jurisdiction by reason of residence within the territory.

Limits of the jurisdiction of the Court against the person of the executor.

95. The jurisdiction of the Court *in personam* may be put in motion either in relation to the distribution of the succession, whether as intestate or in terms of a will or testamentary settlement,[8] or for the purpose of enforcing the performance of the duties

[1] See *Charles* v. *Charles' Trs.*, 1868, 6 M. 744, per Lord Pr. Inglis; *Martin* v. *Stopford Blair's Exrs.*, 1879, 7 R. 329.

[2] *Ferguson* v. *Douglas, Heron, and Co.*, 3 Pat. 503, 510; *M'Morine* v. *Cowie*, 16 Jan. 1845, 7 D. 270; *Mags. of Wick* v. *Forbes*, 11 Dec. 1849, 12 D. 299.

[3] *Robson* v. *Walsham*, 5 Nov. 1867, 6 M. 4.

[4] "I have no doubt as to the competency of the Court of Session in a case where either the persons of executors, or effects of the deceased, are within their jurisdiction. No matter where the will was made or proved, the Court has full jurisdiction, and could carry their judgment into effect. And this might even be where a will has reference to the law of England,"—per Lord Loughborough in *Ferguson* v. *Douglas*, 3 Pat. at p. 510. See the abstract of the earlier cases given by E. of Selborne and Lord Watson in the *Orr-Ewing* case, 13 R. (H.L.) 1. Also *Robertson* v. *Landell*, 2 Dec. 1843, 6 D. 170; *Cruickshank* v. *Cruickshank's Trs.*, 24 Feb. 1843, 5 D. 733, and cases *infra*.

[5] *Cruickshank* v. *Cruickshank's Trs.*, *supra*; *Ferguson* v. *Marjoribanks*, 1 April 1853, 15 D. 637; *Thomson's Trs.* v. *Alexander*, 18 Dec. 1851, 14 D. 217; *Macalister's Exrs.* v. *Macalister's Trs.*, 18 Dec. 1834, 13 Sh. 171.

[6] *Boe* v. *Anderson*, 11 Nov. 1857, 20 D. 11; *Ferrie* v. *Woodward*, 30 June 1831, 9 Sh. 854. See *Robertson* v. *Macvean*, 18 Feb. 1817, F.C. note.

[7] *M'Lachlan* v. *Rob*, 14 May 1831, 9 Sh. 588.

[8] In actions for the distribution of personal estate within the territory of the Court, the process of multiplepoinding

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of the trustee or executor in an action of accounting, or of damages for breach of trust.[1] But this is stated subject to the limitation that the Court will not in general allow an action to proceed against trustees or executors in respect of the presence of one of their number within the territory, where the other executors decline to appear, and it is shown that they are amenable as a body to the Courts of a foreign country from which their authority is derived.[2]

Paramount authority of the forum of administration.

96. Accordingly, in the case of *Preston* v. *Preston's Trustees*,[3] where one of the beneficiaries under a Scottish settlement had taken out administration in England, and was afterwards sued in the Court of Session by the trustees of the settlement, who demanded that the English estate should be transferred to them, to be applied in fulfilment of the purposes of the settlement, the House of Lords directed that the action should be dismissed.

Jurisdiction of the forum of administration not privative.

97. The case of *Young* v. *Ramage* [4] raised for consideration the question whether foreign executors could be rendered amenable to the jurisdiction of the Courts of Scotland by the use of arrestment *jurisdictionis fundandæ causa*. But the decision of the case proceeded, not on the principle of *forum competens*, but on the question of administrative title. In this case a remit was made, and an opinion of counsel obtained as to the duties of executors under the law of Guernsey. On it being ascertained that by the law of that island (which on this point is in accordance with the principles of our jurisprudence) the executor was not bound to distribute the estate until a reasonable time for ingathering and realising the assets had elapsed, judgment was pronounced, not dismissing the action on the ground of defect of jurisdiction, but preferring the executors to the arrested fund on the ground that they were entitled to proceed with the realisation of the estate without interruption. In cases, some of them prior and some subsequent to this, arrestment has been sustained as a ground of jurisdiction in actions against executors.[5]

supersedes the necessity of arrestment *jurisdictionis fundandæ causa* with reference to foreign defenders; *Miller* v. *Ure*, 23 June 1838, 16 Sh. 1204.

[1] See the cases cited *infra*, §§ 96, 97.

[2] *Gillon and Co.* v. *Dunlop*, 27 Feb. 1864, 2 Macph. 776. See as to *forum conveniens*, *infra*, § 98.

[3] *Preston* v. *Preston's Trs.*, 29 Mar. 1841, 2 Rob. 88. The rule was thus stated by Lord Cottenham:—"The domicile of a deceased party regulates the right of succession to his moveable property, but the administration must be in the country in which possession of his property is taken under lawful authority;" and see *Enohin* v. *Wylie*, 10 H.L. Ca. 1, 31 L.J. Ch. 402.

[4] *Young* v. *Ramage*, 16 Feb. 1838, 16 Sh. 572.

[5] *M'Morine* v. *Cowie*, 16 Jan. 1845, 7 D. 270; *Campbell* v. *Rucker*, 2 Mar. 1809, Hume, 258; *Rigby* v. *Fletcher*, 18 Jan. 1833, 11 Sh. 256; *Ranken* v. *Stewart*, 29 Feb. 1840, 2 D. 717; *Innerarity* v. *Gilmore*, 7 Mar. 1840, 2 D. 813.

Plea of *forum non conveniens*, and declinature of jurisdiction.

98. The cases on *forum non conveniens* are not easily classed, because they are for the most part cases of the exercise of judicial discretion in which an action, otherwise competent, has been dismissed, or proceedings therein stayed, on the ground that the action was premature,[1] or that a case was depending in the forum of administration, which was accordingly deferred to as the more convenient forum for adjudicating upon the rights of the claimants.[2] Such cases are by no means inconsistent with the subsistence of the theoretical principle that the Court has a universal equitable jurisdiction *in personam* as well as *in rem*—that is, wherever the administrator or the estate administered to is brought within the sphere of its action upon any of the received grounds of jurisdiction.[3] The manner in which the doctrine of *forum conveniens* is understood and acted on in the Court of Session was explained by Lord Watson in a part of his opinion in the *Orr-Ewing* case, in which the Lord Chancellor expressed his concurrence,[4] of which it may be convenient to quote the more important passages.[5] "I am not aware of any authority in the law of Scotland for entertaining an action in the Court of Session against foreign trustees who can be called to account, and who are willing to account in the proper forum, though action has been sustained in cases where they were neither liable nor willing to answer in that forum. There is another and intermediate class of cases in which it is doubtful whether the Courts of the *forum conveniens* may have it within their power to give the pursuer a full remedy, or to enforce their orders against the persons of the trustees and the trust-estate. In such cases the Court of Session will not dismiss the suit, but will sist procedure, not with the view of superseding, but of aiding the action and supplementing the powers of the foreign court, in order that full justice may be done." "The Courts of Scotland, in declining jurisdiction over foreign trustees, do not rely upon the circumstance of there being no pending litigation in the proper forum. Although there be no *lis alibi pendens*, it is sufficient to oust their jurisdiction on the

[1] *Carron Co.* v. *Stainton*, 27 Jan. 1857, 19 D. 318; *Preston's* case and *Young's* case, *supra*.

[2] *Wilmot* v. *Wilmot*, 6 Mar. 1841, 3 D. 815; *Tulloch* v. *Williams*, 6 Mar. 1846, 8 D. 657; *Hawkins* v. *Wedderburn*, 9 Mar. 1842, 4 D. 924; *Fordyce* v. *Bridges*, 2 June 1842, 4 D. 1334; but see *M'Master* v. *Dickson*, 17 June 1834, 12 Sh. 731.

[3] See also *M'Tavish* v. *Lady Saltoun*, 3 Feb. 1821, F.C.; *Blackett* v. *Gilchrist*, 29 May 1832, 10 Sh. 590; *Peters* v. *Martin*, 21 June 1825, 4 Sh. 107; *Munro* v. *Grahame*, 4 July 1839, 1 D. 1151; *Cruickshank* v. *Cruickshank's Trs.*, 24 Feb. 1843, 5 D. 733; affd. on another point, 4 Bell, 179; *Mags. of Wick* v. *Forbes*, 11 Dec. 1849, 12 D. 299; *Kirkpatrick* v. *Irvine*, 23 June 1838, 16 Sh. 1200; *Forbes* v. *Forbes*, 14 Feb. 1852, 14 D. 498.

[4] *Orr-Ewing* case, 13 R. (H.L.) 9.

[5] 13 R. (H.L.) at pp. 27 and 29.

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plea of *forum non conveniens*, either that the pursuer can obtain his remedy by a suit in the proper forum, or that the trustee, called as a defender, expresses his willingness to institute, and does institute, proceedings in that forum, by means of which the pursuer can have the redress which he claims. There were no proceedings depending in the proper forum when action was raised before the Court of Session in *Campbell* v. *Rucker*,[1] *Macmaster* v. *Macmaster*, or in *Macmaster* v. *Stewart*.[2] In *Peters* v. *Martin*[3] it was alleged by the defender that an effectual proceeding at his instance was depending before the Court of Chancery; but, after an opportunity was allowed to him of substantiating his allegation, their Lordships of the Second Division were satisfied that the statement was untrue, and they permitted the action to proceed on the ground that the defender refused to submit himself to the jurisdiction of the English Court. There are two decisions which have been cited as showing that the Scottish Courts have gone further in sustaining their jurisdiction over English executors than the principles which I have stated would justify. I refer to *Morison* v. *Ker*[4] and *Scott* v. *Elliot*.[5] But it has been repeatedly explained that in neither of these cases was it sought to call an administrator to account for his intromissions with the trust or executry estate, and that explanation is, in my opinion, correct."

Concurrent jurisdiction of Courts of different states.

99. Where the representatives of a defunct are resident in a different country from that in which the estate, if heritable, is situated, or in which, if moveable, it falls to be administered in virtue of the *lex domicilii*, jurisdiction may be lawfully exercised by the courts of either country. To obviate the inconveniences which must result from a divided administration, the courts of either country[6] are understood to have the right to restrain the parties from taking proceedings in the other; and the principle which has guided the Court of Session in the exercise of that right has been to give effect to the jurisdiction of that court in which proceedings were first instituted. In *Young* v. *Barclay*,[7] an action of declarator was raised in the Court of Session, on the allegation that the deceased had died domiciled in Upper Canada, and had left heritable and moveable property, "situated partly in Upper Canada and partly elsewhere, particularly in Scotland;" and, pending that action, the pursuers took proceedings in the Courts

Whether preventive process may be used to maintain an exclusive jurisdiction.

[1] 1809, Hume, 258.
[2] 1834, 12 S. 731.
[3] 1825, 4 S. 108.
[4] 1790, Mor. 4601.
[5] 1797, Mor. 4845.
[6] See *Carron Co.* v. *Maclaren*, 24 L.J. Ch. 620, where the H. of L. (*diss.* Lord St. Leonards) recalled an injunction against proceedings in Scotland as being unnecessary.
[7] *Young* v. *Barclay*, 27 May 1846, 8 D. 774. And see the case of *M'Cublin* v. *Venning*, 3 Dec. 1859, 22 D. 164.

of Canada for the recovery of the property situated there. A note of suspension was presented by the defenders, praying for interdict against the pursuers uplifting or receiving the Canadian property, or "moving or proceeding further in an action, suit, or proceeding commenced in the Probate Court at Toronto." The Court unanimously granted the interdict. Again, in *Dawson's Trustees* v. *Maclean*,[1] where interdict was sought by the raisers of a multiplepoinding for the purpose of prohibiting certain claimants from prosecuting a suit in Chancery in relation to the same succession, the application was refused mainly on the ground of the priority of the English action, coupled with the fact that the respondents were resident outwith the jurisdiction of the Court of Session. Lord President M'Neill[2] observed: "If it appears, in the course of these proceedings, that, to do justice to the parties—to prevent oppression upon the parties—to prevent embarrassment from the course of the proceedings, it is necessary or desirable to impose a restraint upon them as to following out other proceedings elsewhere, which might either defeat or embarrass what is going on here, I think that the parties, being themselves here in such suits, maintaining their interests and persevering in these suits, are subject to the control of the Court in reference to proceedings which they may be carrying on elsewhere, of the kind that I have alluded to."

Effect due to priority in the institution of process.

100. Where the jurisdiction of both Courts is clear, the right of proceeding in either will in general be determined by the priority in the institution of the respective actions. Accordingly, in the case of *Mein* v. *Turner*, the Court declined to pronounce in favour of the right of a trustee in a sequestration, in respect that there was already an undischarged adjudication in bankruptcy in force against the bankrupt in England.[3] If it is clear that the foreign Court has no jurisdiction, the Court of Session will, irrespective of any question of priority, restrain the parties from resorting to it. On this principle, an interdict was granted by the First Division of the Court against removing the title-deeds of a Scottish heritable estate, which the trustees, by an order of the Master of the Rolls, had been required to deposit in the Record Office of the Court of Chancery.[4]

Power to enforce orders, the ultimate test of effective jurisdiction.

101. The necessary and sufficient condition of effective jurisdiction is the power of the Court to enforce its orders; and this consideration is decisive in favour of the supereminent jurisdiction of

[1] *Dawson's Trs.* v. *Maclean*, 4 Feb. 1860, 22 D. 685. And see *Carron Co.* v. *Stainton*, 27 Jan. 1857, 19 D. 318; *British Linen Co.* v. *Breadalbane's Trs.* 24 Dec. 1836, 15 Sh. 356.

[2] Lord Colonsay. 22 D. 691.

[3] *Mein* v. *Turner*, 15 Feb. 1855, 17 D. 435. See *Rattray* v. *White*, 8 Mar. 1842, 4 D. 880.

[4] *Maclachlan* v. *Meiklam*, 9 July 1857, 19 D. 960.

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the forum of the trust, because there only is it possible to secure and detain the trust-estate in order to its distribution according to law. In this ultimate test was found the solution of the problem of jurisdiction which was raised in the famous case of the *Orr-Ewing* succession. The Court of Session, on the application of the testator's family, sequestrated the trust-estate, putting it under the management of a judicial factor, for the declared purpose of preventing the execution of an order of the highest legal authority in England, which would have had the effect of withdrawing the funds from Scotland, and giving to the assumed jurisdiction of the English Court that basis of fact in which it was deficient. Space will not permit of further quotation from the judgments delivered in that case. Let it suffice to say that the House of Lords, the same authority which originally confirmed the order of the English Court, held that the action of the late Lord President and his colleagues in sequestrating the estate was right, while, for reasons which merit careful study, the House disaffirmed the declaratory findings, and modified the terms of the interdict which the Court of Session had issued in order to make the sequestration effective. The jurisdiction of the Court of Session to sequestrate the estate and to discharge the trustees being undoubted, the question resolved into one of the exercise of its discretion under conditions which are thus summed up in the Lord Chancellor's opinion. The Scottish jurisdiction had been invoked by the pursuers, who constituted the majority in number and interest of the beneficiaries under the testator's will. The trust was Scottish in form; the testator was a domiciled Scotsman; if any questions should arise under the terms of the trust, Scottish law must be applied to their solution; the whole trust-estate was *de facto* in Scotland, and neither the trustees nor the pursuers desired it to be removed from that country.[1] These considerations were opposed only by the theoretical right of the English Courts *agere in personam* whensoever a trustee should be found within their territory, a right which never had been exercised, and could not be exercised, in relation to subjects of a foreign state without raising a diplomatic question; and which was maintained to be validly asserted against Scottish trustees only on the ground that the principle of *forum non conveniens* was unknown to the law of England. The chief interest of the case lies in the recognition of the principle that jurisdiction, like the civil authority of a state, rests on an ultimate basis of force; and it will be generally agreed that the vindication of the jurisdiction of the Supreme Court in this case, by putting in force its executive authority, was one of the many services rendered by the late Lord President to his country.

[1] *Orr-Ewing* case, 13 R. (H.L.) 14.

SECTION VIII.

ASCERTAINMENT OF FOREIGN LAW.

Ascertainment of foreign law as matter of evidence.

102. The law of foreign countries is regarded as matter of fact for the purposes of judicial inquiry. It may either be proved by the evidence of skilled witnesses adduced by the parties respectively interested in proving it;[1] or the question of foreign law may be referred to a neutral person or persons, usually advocates of the bar of the foreign country, for their opinion on a joint case. The latter course is the one usually followed in Scotland.[2] Opinions of foreign counsel are generally accepted as conclusive on the questions submitted to them,[3] but in cases of difficulty, or where there is a difference of opinion, the case may be sent back to be reconsidered, or an additional opinion may be taken.[4] The Court of Session is not necessarily bound by the decisions of the Court of the country the law of which is in question, unless in circumstances raising the plea of *res judicata*.[5]

Functions of the municipal and foreign laws distinguished.

103. The chief difficulty in relation to the ascertainment of foreign law is in distinguishing the function of the law administered by the Court and that of the foreign law, in the construction of wills and deeds. And first, it may be safely asserted that the Court has never in any case gone so far as to put a will into the hands of foreign counsel and invite him to construe its provisions. In effect, however, this may have been done by setting forth in the case the terms of the clause on which the question had arisen, and requiring a general opinion with reference to that clause. This practice is thought to be erroneous, and in the more recent cases the practice has been to put specific questions, reserving to the Court the general construction of the will with reference to the opinion obtained in answer to those questions.[6]

[1] In cases sent to trial by jury, foreign law falls to be proved by witnesses at the trial; *Maberly and Co.*, 6 July 1834, 12 Sh. 902. But see *Rutherford* v. *Carruthers*, 24 Nov. 1838, 1 D. 111.

[2] In questions as to the law of a colony which recognises the English system, it is usual to take the opinion of English counsel of the rank of Crown Counsel or practising before the Privy Council in colonial appeals; see *Robertson* v. *Gordon*, 15 Nov. 1814, F.C.; *Macalister's Exrs.* v. *Macalister's Trs.*, 18 Dec. 1834, 13 Sh. 171; *Trotter* v. *Trotter*, 5 Sh. 78, N.E. 72; 3 W. & S. 407; *Thomson's Trs.* v. *Alexander*, 18 Dec. 1851, 14 D. 217.

[3] *Lord Cranstoun* v. *Cunningham*, 16 Feb. 1839, 1 D. 521; *Welsh* v. *Milne*, 12 Dec. 1844, 7 D. 213.

[4] *Kerr* v. *Fyffe*, 4 June 1840, 2 D. 1001.

[5] *Baird* v. *Mitchell*, 14 July 1854, 16 D. 1088; *Boe* v. *Anderson*, 11 Nov. 1857, 20 D. 11; *Robertson* v. *Landell*, 2 Dec. 1843, 6 D. 170.

[6] See *Boe* v. *Anderson*, 8 Mar. 1862, 24 D. 732; *Campbell's Exrs.* v. *Clinton's Trs.*, 22 June 1866, 4 Macph. 858; *Enohin* v. *Wylie*, 10 H.L. Ca. 1, 31 L.J. Ch. 402.

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104. The duty of a Court of construction in relation to the interpretation of foreign instruments was thus expounded by the House of Lords, in a case which may now be regarded as the leading authority on the subject: "Where a written contract is made in a foreign country and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art used in it (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction (if any such rules exist) of the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction."[1]

House of Lords, on appeal from Scotland, judge of questions of English law.

105. Although the judges of our Court can only give effect to the statements of foreign law laid before them in evidence, yet, where the evidence relates to the law of England or Ireland, it may be rejected by the House of Lords, who, as the Supreme Court of Appeal for the United Kingdom, are entitled to form an independent opinion on any question of British law coming before them, without reference to the jurisdiction of the Court in which the case originated.[2]

Duty of court of construction in case of difference of opinion among witnesses as to foreign law.

106. In certain cases the duty of examining the foreign law in its proper sources may even devolve upon the Court of first instance, as in the case of an irreconcileable difference of opinion among the counsel whose evidence is laid before it. In such cases the Court will consider the reasons assigned for the different opinions, and examine the authorities cited in support of them. This process, though it may be called a balancing of evidence, is practically not very different from the formation of an independent opinion after hearing the arguments of counsel. The most instructive example is Lord Stowell's celebrated judgment in *Dalrymple* v. *Dalrymple*.[3] In other cases the Court may be satisfied upon the evidence that there are no peculiar rules of construction, and no rules of foreign law applicable to the construction of the instrument, in which case the Court may proceed to construe it without extraneous assistance. Thus, where the opinion of counsel

[1] *Duchess di Sora* v. *Phillips*, 10 H.L. Ca. 624, 33 L.J. Ch. 129. The passage quoted is from Lord Cranworth's opinion, 10 H.L. Ca. 633, but the most complete exposition of the law of the subject will be found in Lord Chelmsford's opinion, pp. 636-642.

[2] *Stein's Assignee* v. *Brown*, 23 Feb. 1831, 5 W. & S. 47; *Macpherson* v. *Macpherson*, 11 June 1852, 1 Macq. 243; *Fenton* v. *Livingstone*, 15 July 1859, 3 Macq. 497; *Cooper* v. *Cooper*, 1888, 15 R. (H.L.) at pp. 26 and 28. It is doubtful whether this rule applies where the opinion on which the Scottish Court proceeds relates to a point of English Ecclesiastical or Maritime Law, where the appeal is not to the House of Lords but to the Privy Council; *Geils* v. *Geils*, 1 Macq. 257, note.

[3] *Dalrymple* v. *Dalrymple*, 2 Hag. Con. Rep. 54.

upon a case stated by the Court was to the effect that "the import or construction of the will is not purely or exclusively a question of English law,—that it does not depend on any technical rule of English practice,—but that it is a question on which the judge of any Court conversant with the language in which the will is written is entitled and bound to give his judgment according to his understanding and the plain interpretation of the words used," the Court, by a majority of the whole judges, adopted the opinion in so far only as it affirmed the validity of the will, and rejected the opinion as regarded the construction put upon its provisions.[1]

Law Ascertainment Acts.

107. The ascertainment of disputed questions of British and Colonial law is now regulated on a different principle by Act of Parliament.[2] The statute provides for the ascertainment of the law of one part of Her Majesty's dominions when pleaded in another part by laying a case before the Superior Court of the country the law of which is to be ascertained,—the opinion so obtained being subject to review by the House of Lords or Privy Council on appeal. By a subsequent Act similar relations are established between the Superior Courts of Her Majesty's dominions and those of "any foreign country or state, with the government of which Her Majesty may be pleased to enter into a convention" for that purpose.

[1] *Thomson's Trs.* v. *Alexander*, 18 Dec. 1851, 14 D. 217; see also *Trotter* v. *Trotters*, 10 June 1829, 3 W. & S. 407, affg. 5 Sh. 78; *Cranstoun* v. *Cunninghame*, 16 Feb. 1839, 1 D. 521; *Gowan* v. *Bradley*, 14 Feb. 1845, 7 D. 433.

[2] 22 and 23 Vict., cap. 63; 24 and 25 Vict., cap. 11. Under the Law Ascertainment Acts several cases have been sent by the Court of Chancery for the opinion of the Court of Session. See, for example, *Baroness de Blonay* v. *Oswald's Representatives*, 17 July 1863, 1 M. 1147; *Lord* v. *Colvin*, 15 July 1865, 3 M. 1083; *Mitchell* v. *Mitchell*, 17 Mar. 1865, 3 M. 721; *Arthur and Seymour* v. *Lamb*, 1870, 8 M. 928. As an example of a remit by a judge of the Court of Session to the High Court of Justice, and the form in which judicial opinions are returned, see *Hewit's Trs.* v. *Lawson*, 18 R. 793.

PART II.

INTESTATE SUCCESSION AND ITS RELATIONS TO TESTAMENTARY SUCCESSION.

CHAPTER III.

OPENING OF THE SUCCESSION BY SURVIVANCE.

DEATH OF THE ANCESTOR OR TESTATOR. | WHETHER ANCESTOR SURVIVED BY A NEARER HEIR.

Succession opens by survivance.

108. To the acquisition of a vested interest in succession of any description it is essential that the heir shall have survived the person whose succession is claimed.[1] And so where a right constituted by deed vests in the grantee at a period which may happen in the granter's lifetime, as in the case of certain marriage-contract provisions, it is not to be regarded as a succession, but as a trust *inter vivos*.[2] Intestate succession, whether heritable or moveable, now vests in the heirs or personal representatives by mere survivance, service or confirmation being only requisite as matter of title.

Character of heir fixed at ancestor's death.

109. The persons who, on the opening of a succession by death, have the character of heirs-at-law, acquire by survivance certain rights in relation to the succession of the deceased, and also the right of taking in that character any estate which may be destined designatively to the "heirs" of the deceased. In order to the acquisition of a vested interest in estate given to the "heirs" of a person named, it is, of course, necessary that the heir should not only survive the ancestor to whom he claims to be heir, but also the maker of the will or settlement under which he is called to

[1] The subject of the presumption of life, including the statutory law, is very completely and satisfactorily treated in a monograph by Mr. J. H. Stevenson, Advocate, published in 1893.

[2] The case of the devolution of a succession, in consequence of the contravention of the prohibitions of an entail during the lifetime of the contravener, is scarcely an exception. The estate is in reality, if not in form, the succession of the entailer as long as it is subject to the destination and bound by the conditions which he has imposed upon it.

the succession. Under such a destination those alone are entitled to take who were heirs of the party named at the opening of *his* succession and their representatives.[1]

Questions of survivance depending on presumption of life.

110. Subject to the exception created by Statute in the case of persons convicted of treason,[2] it may be asserted that the opening of a succession takes place universally at the moment of death. This, however, does not imply that the succession immediately vests either in right or possession, but only that it may do so.[3] The survivance of the persons claiming the character of heirs is always a point of the first importance in questions of succession. The question of survivance presents itself in two forms: First, Whether the death of the person whose succession is claimed is proved by direct evidence or by circumstances sufficient to overcome the presumption of life? and secondly, Of two persons actually deceased, which is to be held to have survived the other? The first of these questions is one into which the presumption in favour of life largely enters; the second is purely a question of fact.

SECTION I.

Death of the Ancestor and Presumption of Life.

How presumption overcome. Inferences from occupation of deceased.

111. Where the person whose succession is claimed was a seafaring man, or was engaged in military service, or was otherwise exposed to unusual hazard—as by residing in an unhealthy locality, or in a remote or unprotected settlement—the presumption of life will be more easily overcome. Thus the claims of the heirs were held to be established in a case where the party alleged to be dead was bred a sailor, and had emigrated to British North America in 1803, and had not been heard of between 1804 and 1841, when the action was raised;[4] and in another case where two parties, to whom annuities were due, had gone abroad, the one as a sailor, the other as a private soldier, and nothing had been heard of either for

[1] *Gregory's Tr.* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10; *Maxwell* v. *Wylie*, 25 May 1837, 15 Sh. 1005; *Pearson* v. *Corrie*, 28 June 1825, 4 Sh. 119, N.E. 120; *dicta* in *Lord* v. *Colvin*, 7 Dec. 1860, 23 D. 111; 15 July 1865, 3 Macph. 1083.

[2] By this Statute, 7 Anne, cap. 21, the penalty of corruption of blood is attached to conviction of treason; the effect of which is, that the attainted person cannot succeed as heir to any one, and that neither his posterity nor collateral kindred can inherit anything of or through him. See 1 Hume on Crimes, Bell's ed., 549.

[3] In the case of heritable as well as moveable estate, a succession may accrue in the shape of a resulting or lapsed interest, long after the death of the party whose heirs are entitled to inherit. It will be convenient to postpone the consideration of the vesting of this class of rights to a subsequent chapter, in which the subject of lapsed interests is separately treated (Chapter LVII.).

[4] *Garland* v. *Stewart*, 12 Nov. 1841, 4 D. 1.

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thirty-two years;[1] and again in a case where the individual had been hired for service to the East India Company's settlements in Bengal, and had not been heard of for seventeen years, and was commonly reported to be dead.[2] But the presumption of life was not held to be overcome by evidence that the individual had gone out as a sailor to Tobago, at the age of thirty, and had not been heard of for twenty years.[3] According to the later decisions, it would appear that greater weight is attached to the presumption of life now than formerly, and that some positive evidence or counter presumption is requisite to overcome it.

Case of passengers by ship which is lost at sea.

112. Where the party whose survivance is in question is proved to have sailed with a ship which never arrived at its destination or was afterwards heard of, the presumption of life is overcome.[4] In one of the cases, a suspension at the instance of a purchaser from the heir of the absentee, the heir, at the suggestion of the Court, agreed to find security to repay the price, limited to seven years.[5]

Presumption may be overcome by mere elapse of time.

113. Mere elapse of time is not in general considered sufficient to overcome the presumption of life in the case of a person who is absent from the country. It is matter of notoriety that emigrants who form new connections in their adopted domicile frequently cease to correspond with their friends or relatives in the mother country; and it would be unreasonable to conclude that such persons had ceased to exist from the mere fact of their history being unknown to those who may have no interest in tracing it. Upon this principle were decided the cases of *Fife* and *Barstow*, where the Court declined to hold that the succession had opened, although the parties had been lost sight of for the respective periods of seventeen and thirteen years, with the additional element in the latter case of great age.[6] But the elapse of a long interval of time without the receipt of intelligence of the party is an important

[1] *Stirling* v. *Mackenzie*, 11 Mar. 1847, 9 D. 923. See also *French* v. *E. of Wemyss*, 1677, M. 12,644, a similar case.

[2] *Hogg* v. *Hume*, 1706, M. 12,645. And see *Sands* v. *Her Tenants*, 1678, M. 12,645, where the husband of the pursuer, who was in good circumstances, had joined a privateering expedition at Jamaica, and had not since been heard of.

[3] *Campbell* v. *Lamont*, 17 June 1824, 3 Sh. 145 (N.E. 98). See also *Tait* v. *Wood*, 10 Feb. 1866, 4 Macph. 443.

[4] *Erskine* v. *Stephen*, 1622, M. 11,656; *Forrester* v. *Boucher*, 1670, M. 11,674; *Lord Ashburton* v. *Baillie*, 7 Feb. 1811, F.C.

[5] *Ashburton* v. *Baillie*, *supra*.

[6] *Fife* v. *Fife*, 16 June 1855, 17 D. 951; *Barstow* v. *Cook*, 14 Mar. 1862, 24 D. 790. In *Kennedy* v. *Maclean*, 15 Feb. 1851, 13 D. 705, the party whose survivance was in question had been lost sight of for nineteen years; and the Court (on the assumption that he was to be presumed alive) sustained the title of his factor *loco absentis* to sue a reduction of a service. See also *Lapsley* v. *Grierson*, 18 Nov. 1845, 8 D. 34, where there was the additional element of cessation of communication between the absent party and his wife, explained by his dissatisfaction with his wife's conduct before his departure, and her subsequent cohabitation with another man. Also *Reed* v. *Brown* 14 Jan. 1834, 12 Sh. 278.

element, if there be nothing in the circumstances to account for the discontinuance of communications with his friends or family, and there are cases which have been given against the presumption of life upon no other ground than this, to the effect of putting the heir in possession upon finding security to repay.[1] In the cases actually decided the age of the party has not been a very important element; though, if the party were of great age when last heard of, the circumstance would be entitled to weight.[2]

Presumption of life as now regulated by Statute.

114. The rule of the law of England, according to which the presumption of life is held to be overcome by seven years' absence and cessation of communication, was not admitted in the jurisprudence of Scotland, nor was there any counter presumption corresponding to it.[3] But the presumption of life is now regulated by Statute. The Statute now in force (54 and 55 Vict., cap. 29) begins by repealing the Act of 1881, and enacts, by section 3, "When any person has disappeared and has not been heard of for seven years or upwards, the Court, on the petition of any person entitled to succeed to any estate on the death of such person, or entitled to any estate the transmission of which to the petitioner depends on the death of such person, or the fiar of any estate burdened with a liferent in favour of such person may, after such procedure and inquiry by advertisement or otherwise as it may direct, find that such person has disappeared, and find what was the date on which he was last known to be alive, and find on the facts proved or admitted that he died at some specified date within seven years after the date on which he was last known to be alive, and where there is no sufficient evidence that he died at any definite date, find that he shall be presumed to have died exactly seven years after the date on which he was last known to be alive; and it shall thereafter be competent to the person who has pre-

[1] *Fettes* v. *Gordon*, 7 July 1825, 4 Sh. 149, N.E. 150 (periods of absence 34 and 24 years: ages not mentioned); *Hislop or Gordon*, 15 June 1830, 8 Sh. 919 (absence 25 years: age not stated); *Ruthven* v. *Clark*, 1628, M. 11,629 (absence, 17 years: legacy of trifling value); *Chambers* v. *Carruthers*, 14 July 1849, 11 D. 1359 (absence 35 years: age 63 if alive at the date of the action); *Campbell* v. *Campbell's Tr.*, 1 Feb. 1834, 12 Sh. 382 (absence 29 years: age not stated). In all these cases the heir was required to find caution for repayment. See also *Bruce* v. *Smith*, 1871, 10 M. 130 (age at period of opening of succession 79: habits irregular, presumed dead); *M'Lay* v. *Borland*, 1876, 3 R. 1124 (age, if alive when succession opened, 90; presumed dead).

[2] Stair, 4, 45, 17; Ersk. 4, 2, 36; Bankton, vol. i. p. 667, and cases there cited. Mr. Dickson judiciously observes, that in cases depending on this consideration, the number of years at which an actuary would calculate the value of the life ought to be proved, as affording the datum point of its probable duration. The Court could then fix what additional years they would allow, according to the circumstances of the case. Dickson on Evidence, § 299 (*d*).

[3] *Fife* v. *Fife*, 17 D. 954, per Lord J.-C. Hope. As to the rule in question, see 1 Phillips' Evidence, 10th ed., 478; Dickson on Evidence, § 309.

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sented the petition, and to any other person entitled to succeed to any estate on the death of the person who has disappeared, or entitled to any estate the transmission of which, or the disburdening of which from a liferent, depends on the death of the person who has disappeared, to make up titles to and to enter into possession of and to sell or dispose of or to burden such estate as if the said person had actually died at the date on which the Court has found that he is proved or presumed to have died: Provided always, that nothing herein contained shall entitle any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died." Section 4 empowers a *pro indiviso* proprietor to sell, subject to the approval of the Court, property of which a share belonged to a person who has disappeared, and has not been heard of for seven years. Section 6 reserves the right of the absent person to vindicate his estate, or its price if sold, but not the income thereof. Section 7 bars the right to recover (even from gratuitous holders), after the lapse of thirteen years, a provision which it is difficult to reconcile with justice or legal principle, but which was probably intended to protect successors against fictitious claims of the character with which the public mind had become familiar through the celebrated Tichborne case. Section 8 amends the provision of the Entail Amendment Act, 1882, with respect to the consents of absent heirs; and section 11 excepts the case of claims on policies of assurance from the operation of the Act, leaving the person claiming under the policy to prove the death in the same manner as if the Act had not passed. The subject belongs rather to Court practice than to the law of succession, and it may suffice to give a reference to the decisions on a few cases which came before the Inner House under the statute of 1881.[1]

Inference in such cases as to probable period of death.

115. Where elapse of time and cessation of communication are the chief circumstances which go to negative the presumption of life, no inference can be drawn from these as to the probable period of cessation of life. In a case of this kind the Court held that the absent party must be presumed to have survived his father, who died four months after the disappearance; and the same result must have followed although these events had been separated by a longer interval of time.[2] In other cases it has been found possible to ascertain approximately the period of death, or to ascertain

[1] *Rainham* v. *Laing*, 1881, 9 R. 207; *Craig*, 1881, 9 R. 435; *Peterhead School Board* v. *Yule's Trs.*, 1883, 10 R. 763; *Williamson* v. *Williamson*, 1886, 14 R. 226.

[2] *Bruce* v. *Robson*, 25 Feb. 1834, 12 Sh. 486.

that it must have happened before or after a particular event, according to the nature of the question, and thus to determine the conditions of the event upon which a succession or destination-over is dependent. The case of *Fairholme* v. *Fairholme's Trustees*, in which the question was as to the survivance of Lieutenant James Fairholme, one of the officers of the ill-fated Arctic expedition of Sir John Franklin, presents an interesting illustration. The Court found that the deceased gentleman could not have survived his uncle (who died in May 1853), and decerned in favour of George Fairholme, brother of James, who was the next instituted heir under the uncle's will.[1]

Evidence that absent person reported dead.

116. In the undernoted cases the Court has admitted evidence that the person whose survivance is in question was reputed to be dead.[2] The fact that the succession has been taken up by service or confirmation is an element of evidence, but has not much weight, except as part of the evidence of notoriety.[3]

SECTION II.

Whether Ancestor was survived by a nearer Heir.

Survivance must be proved by representatives of alleged survivor.

117. Where a deceased person is alleged to have acquired certain rights by his survivance of another person, the fact of survivance must be established to the satisfaction of the Court as a condition of the vesting of the alleged right. Where, therefore, for want of evidence, the Court is unable to determine that one of two deceased persons survived the other, the result is, that the parties interested in proving his survivance (*e.g.*, his heirs, appointees, or substitutes under a destination) have failed to prove their case, and that their claim ought to be dismissed. Where the representatives of each of the deceased persons are interested in establishing their ancestor's survivance of the other, and the fact of survivance cannot be determined, neither party will be entitled to a judgment.

Case of two persons perishing by same calamity.

118. There is one case of indeterminate survivorship which, from its peculiarity, has in some systems of jurisprudence been

[1] *Fairholme* v. *Fairholme's Trs.*, 18 March 1858, 20 D. 813. In *Ommaney* v. *Stilwell*, 23 Beav. 328, Lord Romilly, M.R., held that a sailor, who formed one of the same expedition, and who when he sailed was young and strong, had survived January 1850.

[2] *Sands* v. *Her Tenants*, 1678, M. 12,645 ; *Forrester* v. *Boucher*, 1670, M. 11,674 ; *Hogg* v. *Hume*, 1706, M. 12,645 ; *Lord Ashburton* v. *Baillie*, 7 Feb. 1811, F.C. ; *Hislop or Gordon*, 15 June 1830, 8 Sh. 919 ; *Campbell* v. *Campbell's Tr.*, 1 Feb. 1834, 12 Sh. 382.

[3] *Ashburton* v. *Baillie, supra ; Campbell* v. *Lamont*, 17 June 1824, 3 Sh. 145, N.E. 98 ; *Bannerman* v. *Bannerman*, 1738, M. 11,662 ; *Burns* v. *Ogilvie*, 1753, M. 11,667.

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made the subject of presumptions of a somewhat arbitrary character. We refer to the case of persons perishing by the same calamity, as in the case of shipwreck, fire, or battle. It appears to the writer that in this case the representatives of the person alleged to have survived the other must establish by evidence the fact of survivance. The circumstance that two persons met their death at the same place, and nearly at the same time, may increase the difficulty of proving survivance, but cannot shift the onus of proof, or make it less necessary that the fact of survivance should be proved, if the right asserted by the claimant is founded on survivorship.[1] According to the Civil [2] and French Laws [3] the fact of survivance in this class of cases is determined upon certain arbitrary presumptions, depending on the age and sex of the parties. But the rules of the Civil Law are only binding in Scotland in relation to new questions in so far as they are reasonable, and in this matter the Court would most probable disregard the special presumptions, and follow the rule that proof of the fact of survivance is incumbent on the party making the allegation.

119. In England the law was so fixed by the decision of the House of Lords in *Wing* v. *Angrave*,[4] a case where a husband and wife perished in a shipwreck, and were swept overboard by the same wave. Each of the spouses had appointed the other, in the event of his (or her) survivance, to take certain shares of succession, of which they had respectively the power of disposal under a deed of settlement. The husband's heirs claimed the estate given to him by his wife's will. The wife's heirs made a similar claim to the estate given by the husband to her. The judges, both in the Court of Chancery and on appeal, were unanimously of opinion that neither party had proved his case; and in the result the judgment of the House of Lords was to the effect that the whole succession in question passed to the heirs named in an ulterior destination in the settlement giving the power of appointment.

Different cases in which survivance must be proved.

120. In the application of the rule established by the case of *Wing* v. *Angrave* to questions of indeterminate survivance, the following consequences may be deduced. 1. Where two persons stand in the relation of granter and grantee under a will or *mortis causa* deed, and the heirs of the grantee are unable to prove that

[1] Dickson on Evidence, § 311; Best on Presumptions, p. 201.

[2] Dig. lib. 34, tit. 5, l. 9, §§ 1, 4; id. tit., l. 22. See *Mackeldey*, Man. de Dr. Rom., ed. 1846, p. 83.

[3] Code Civile, § 720.

[4] *Wing* v. *Angrave*, House of Lords, 30 L.J. Ch. 65, where the previous cases are cited and commented on. See also another branch of the same case, *Underwood* v. *Wing*, 24 L.J. Ch. 293; also *Mason* v. *Mason*, 1 Mer. 308, where an issue was directed to determine which of two persons who perished in the same shipwreck survived; *Taylor* v. *Diplock*, 2 Phill. 261; *Stanwix's* case, there quoted, and *Sillick* v. *Booth*, 1 T. & C. C.C. 117; 11 L.J. Ch. 123.

he survived the granter, it will be held that the subject of the gift did not vest in the grantee, but passed to the next institute,[1] or to the granter's heir-at-law. 2. Where the party alleged to be the survivor would have had right to a share of the intestate moveable succession of the other, then, unless his survivance is proved, the right will not be taken to have vested in him so as to be transmitted to his heirs.[2] It is very doubtful whether his issue would be entitled to the succession by representation; for, under the Statute, their claim only arises in case the parent has "predeceased" the intestate; and in the case supposed it cannot be known with certainty which of the parties predeceased the other.[3] 3. Where the one party is heir-at-law of the other, the result is the same as in the last case in relation to such heritages as vest without service, except that the difficulty with regard to persons taking by representation does not arise.[4] 4. Where the parties are nominated in succession as institutes or substitutes under the same deed, and one of them was in possession at the time of his death, no right vests in the other unless he is proved to have been the survivor.[5] 5. Where the parties are respectively the heirs, representatives, or legatees of each other, and neither can be shown to have survived, they are not held to have succeeded to each other, and the nearest surviving heirs of either will have right to the succession of his ancestor.[6]

[1] *Fettes* v. *Gordon*, 7 July 1825, 4 Sh. 149, N.E. 150. If, on the other hand, the fair inference from the evidence is that the legatee survived the period of vesting (although the date of his death is unknown), the fund will pass to his representatives (*Hislop or Gordon*, 15 June 1830, 8 Sh. 919); or to the next substitute under the destination, if there is an operative substitution (*Campbell's Trs.* v. *Campbell*, 1 Feb. 1834, 12 Sh. 382; *Fairholme* v. *Fairholme's Trs.*, 18 March 1858, 20 D. 813).

[2] *Wing* v. *Angrave*, 30 L.J. Ch. 65, and 8 Clark's H.L. Ca. 183.

[3] See the Act, 18 Vict., cap. 23, § 1.

[4] On the other hand, where a person has been absent from the country for such a length of time as to overcome the presumption of life, it is often a matter of uncertainty whether he was married and has left heirs of his body, an element which increases the difficulty of holding the estate to have vested in a collateral heir. See *Reed* v. *Brown*, 14 Jan. 1834, 12 Sh. 278; *Chambers* v. *Carruthers*, 14 July 1849, 11 D. 1359. In such cases it is usual for the next heir to obtain service *ex parte*, in order to preserve his right to any succession which may afterwards be held to have accrued. See *Campbell* v. *Campbell's Trs.*, *supra*.

[5] See *Fairholme* v. *Fairholme's Trs.*, 20 D. 813.

[6] *Wing* v. *Angrave*, *supra*.

CHAPTER IV.

ORDER OF LEGAL SUCCESSION IN RELATION TO THE HERITABLE ESTATE.

1. Succession of Heirs-at-Law.
2. Division of the Heritable Succession.
3. Of Terce.
4. Of Courtesy.

121. Destinations in settlements of heritable estate being for the most part founded on some modification of the legal order of succession, the study of the laws which regulate legal descent naturally takes precedence of the law of succession by destination. The present chapter is confined to the subject of descent, strictly so called; the vesting of the succession, and the rights and liabilities of heirs, being reserved for discussion in subsequent chapters.

SECTION I.

Of the Succession of Heirs-at-Law.[1] (Descending, Collateral, and Ascending Lines. The Crown.)

Explanation of terms used in defining the order of legal succession.

To the exposition of this part of the subject little more is requisite than a distinct definition of the technical language employed in the description and classification of heirs. The rules of succession are for the most part implied in the definition of the technical terms, and are in themselves very simple.

122. I. Definition of Terms.—*Heritable Succession.*—The devolution of heritable estate by death to the person or persons who are by law preferred to the inheritance in respect of proximity in blood to the deceased.[2]

[1] It may be remarked that the character of heir-male, though not belonging to the category of heirs-at-law in the strict sense of the term, is a general character, and carries with it certain legal rights independently of express destination. The most important of these is the right of succeeding to peerages or inheritable titles of honour, where no express destination is prescribed by the patent or grant. In such cases the presumption has been established that honours descend to the *heirs-male of the body; Glencairn Peerage*, 13 July 1797, reported by Macqueen, 1 Ap. Ca. 444; *Herries Peerage*, 23 June 1858, 3 Macq. 588, 600. And this presumption is not overcome by the circumstance that the family estates are destined by the ancient titles to heirs-female on the failure of heirs-male; *Kennedy* v. *Earl of Ruglen and March*, 26 Jan. 1762, 2 Pat. 55. See as to service in the general character of heirs-male, Chapter XXX., *infra*.

[2] Ersk. 3, 8, 2.

Line of Succession.—Any series or class of persons connected with the defunct by descent from a common ancestor, or from the defunct himself, and capable of succeeding to him, either immediately or upon the failure of nearer heirs.[1]

Paternal Line.—Persons connected with the defunct by descent from a common male ancestor, where the series of persons connecting the defunct with the common ancestor consists wholly of males.

Maternal Line.—Persons descending from a common ancestor with the defunct where the connection between the common ancestor and the defunct is not wholly by males. There is no succession in the maternal line, and the term is only used in contradistinction to the paternal line of succession.

Heirs.—The individual members of the various lines of legal succession in the order in which they are entitled to succeed to the defunct.

Ascendants.—The ancestors of the defunct in the paternal line; that is, connected with him wholly by males.[2]

Descendants.—The members of the line of legal descent flowing from the defunct himself in the order of preference indicated by the laws of primogeniture and preference of males.

Collaterals.—These are either collateral to the defunct himself, or collateral to some ancestor in the paternal line. They are—

(1) The members of the lines of legal descent flowing from the defunct's brothers and sisters german or consanguinean, in the order established by the rules of collateral succession.

(2) The members of the lines of legal descent flowing from the brothers and sisters german or consanguinean of any ascendant of the defunct, in the order of collateral succession.[3]

Representation.—The rule of law according to which the issue of any heir take rank in their order immediately after him in the scheme of succession, to the exclusion of remoter heirs in the same degree.[4]

123. *Heir-at-Law.*—The nearest lawful heir of the defunct. Terms descriptive of heirs.

Heirs of Line.—The same. In the collateral line of succession, the expression "heir of line" is used to denote the heir of the principal line of succession, or heir of the heritage, in contradis-

[1] Ersk. 3, 8, 4; Bell, Pr. § 1647.

[2] Ersk. 3, 8, 9.

[3] Ersk. 3, 8, 8-9; Bell, Pr. § 1655.

[4] The term is thus explained by an institutional writer,—"There is a right of representation peculiar to heritage, by which one succeeds in heritable subjects, not from any title in his own person, but in the place of and as representing some of his deceased ascendants. . . . The word *representation*, when applied to this right, must not be understood in that sense in which it is commonly taken by lawyers, as if the grandchild [succeeding to his grandfather] were liable for the debts of his immediate father, whom he represents; he represents him barely in his propinquity, and not in his debts;" Ersk. 3, 8, 11.

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tinction to the heir of conquest. The order of succession in conquest deviates from the principal line of succession in the branches collateral to the defunct and to his father; that is, in the case of brothers and sisters, uncles and aunts, and their issue.

Heirs-Portioners.—Sisters inheriting the succession *pro indiviso*, or their issue taking by representation.

Full-Blood.—Brothers and sisters german (by the same marriage) of the defunct; also brothers and sisters german of any ancestor of the defunct in the paternal line, and their issue.[1]

Half-Blood Consanguinean.—Brothers and sisters consanguinean of the defunct (by the same father but by a different mother); also brothers and sisters consanguinean of any ancestor of the defunct in the paternal line, and their issue.[2]

Half-Blood Uterine.—Brothers and sisters uterine (by the same mother only) of the defunct, or of any of his ascendants, and their issue. Uterine relatives belong to the maternal line, because the common ancestor from whom they derive their descent is a female. Uterine relatives, therefore, do not succeed to one another by the law of Scotland.[3]

Heritable succession does not depend on tenure.

124. II. LINES OF SUCCESSION.—Heritable succession in Scotland is not affected by considerations of tenure. The order of succession is the same however the subjects may be held. The only exception (now abolished with respect to successions opening after 1st October 1874) was the rule that newly acquired property, if feudalised, descended to the heir of conquest, but if otherwise, to the heir of line.[4] In former times the udal lands of Orkney and Shetland were divisible in equal shares among the children or next of kin,[5] but this custom seems to have gradually disappeared, and questions of the intestate succession to such lands are now determined in conformity with the ordinary rules of heritable succession.[6]

Law of the series.

125. The following is a statement of the different lines of succession in the order of priority or preference. It will be seen that it takes the form of a series, the law of which is apparent from the first four terms:—

First—Lineal descendants of the intestate.

Second—Brothers and sisters of the intestate and their issue (collaterals to the intestate).

[1] See Ersk. 3, 8, 8-9.

[2] *Ibid.*

[3] Ersk. 3, 8, 8; *Alexander* v. *Clark*, 1696, M. 14,873. "This doctrine, at least as to succession in heritage, may be deduced from the choice or *delectus* of a special family made by the superior in his feudal grant, which would be elided if the fee were descendible to the kinsmen of the mother, whom the law considers as of a different family from the mother:" Ersk., *ut supra*.

[4] This subject is treated *infra*, Section II.

[5] See the authorities cited in Bell, Pr. § 932.

[6] *Rendall* v. *Robertson*, 15 Dec. 1836, 15 Sh. 265; *Beatton* v. *Gaudie*, 2 Feb. 1832, 10 Sh. 286.

Third—The intestate's father.

Fourth—Brothers and sisters of the intestate's father (collaterals to the father) and their issue.

Fifth—The intestate's paternal grandfather.

Sixth—Brothers and sisters of the intestate's paternal grandfather (collaterals to the grandfather) and their issue. And so on *in infinitum*.[1]

From whom the lines of descent are traced.

126. In the Civil Law, in which the right of succession is founded upon affinity reckoned by degrees, the degrees of descent are reckoned *from the common ancestor*,[2] but in the case of heritable succession, in which proximity of blood is reckoned not by degrees but by lines, the collateral lines are considered as springing *from the first collateral of the line*, who is necessarily a brother or sister of one of the intestate's ancestors. This mode of considering the subject of succession exhibits more clearly than the other the divergence of the lines of the full and the half blood, and is in conformity with the actual order of succession.[3]

Descending line of succession.

127. III. Order of Succession in the Descending Line.—In heritable succession by descent, the chief points are—(1) the postponement of female heirs to males of the same degree; (2) primogeniture among male heirs, or the succession of the eldest lineal representative of the intestate; and (3) representation, by which the issue of a predeceasing elder son take precedence of younger sons and their issue. The operation of these rules is as follows:—

Law of the series.

The estate descends in the first instance to the eldest son of the person last seized, and failing him, to his eldest son or other issue, male or female, in their order. Failing the eldest son and his issue, the succession passes to the second son with his issue, male or female, in their order; and so on, through all the sons (with

[1] Stair, 3, 4, 3-7; Ersk. 3, 8, 5-9; Bell, Pr. §§ 1657-1668.

[2] Inst. 3, 6; Dig. 38, 10.

[3] The customary mode of tracing descent in the collateral branches of heritable succession in Scotland, not from the common ancestor but from the highest collateral, gives probability to the supposition that under our ancient law ascendants were altogether excluded from the succession. As long as a feu continued in the same family there could be no place for the succession of ascendants, for the father must have already enjoyed the estate before it could pass to his son. After land came to be regarded as a subject of commerce, the propriety of recognising the right of the father to succeed to the conquest of son, led to a modification of the feudal rule in his favour, and ultimately the right of succession was extended to other ascendants in their order. Craig, 2, 13, 47, in a passage cited by Ersk. 3, 8, 7, asserts that the first instance of a father being served heir to his son occurred in the sixteenth century. The Earl of Angus had conveyed an estate to his son, after whose death he obtained himself served heir to the latter to the same estate. In Stair's time, the succession of ascendants was fully established, Stair, 3, 4, 35; and see his observations at 3, 4, 20, and Erskine's Principles, 3, 8, 3.

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their issue) in their order. Failing sons and their issue, the daughters of the person last seized (whether by the same or different marriages) inherit *pro indiviso*, as heirs-portioners,[1]—the issue of those who have died, if any, taking the mother's share. Where one of the daughters has predeceased the intestate, leaving female issue only, her issue inherit the mother's share *pro indiviso*, but where a daughter dies leaving male issue, the law of primogeniture applies, and the eldest son becomes heir-portioner in place of his mother, the succession being always taken *per stirpes*. Thus, if an intestate have four daughters born to him, of whom the first predeceases him unmarried, the second dies leaving sons, the third dies leaving daughters surviving her, and the fourth survives her father, the division of interests will be as follows:—One-third of the estate *pro indiviso* will be taken by the eldest surviving son of the second daughter, one-third will be shared by the female issue of the third daughter, and one-third will go to the surviving daughter.[2]

Application of the law to descent traced from a collateral.

128. The order of succession among the issue of any of the intestate's children is the same as that which obtains in relation to the children themselves. In tracing descent from a collateral relative of the intestate, the order of succession among the issue of such relative is the same as that which prevails among the issue of the intestate himself.

Ascending line of succession.

129. IV. ORDER OF SUCCESSION IN THE ASCENDING LINE.—Each branch of the ascending line consists of a single member only, who is, as already explained, a paternal ancestor of the intestate. Paternal ancestors succeed immediately after, that is upon, failure of their own descendants.[3]

Effect of birth of nearer heir after succession has opened.

130. It is in this branch of succession only that the question arises as to the right of a nearer heir born after the succession has vested. This case occurs when a person is served heir to his child, or grandchild, in consequence of the failure of collateral issue, and afterwards has another child born to him. Cases of this kind having arisen under successions constituted by deed of entail, the rule was established[4] that the birth of the nearer heir divested the more remote.[5] The same question having arisen in a case of

[1] Ersk. 3, 8, 13.

[2] The above is a connected summary of the course of succession in the descending line as explained by the institutional writers. See Stair, 3, 4, and Ersk. 3, 8, *passim*. The best analysis of the order of succession is that given by Bell, Pr. § 1656 *et seq.*

[3] See Table, p. 78.

[4] Chapter XXX., Section III. (Service and Entry of Heirs of Provision).

[5] *Bruce* v. *Melville*, 1677, M. 14,880, and *Bannatyne* v. *Lowrie* (*Blackwood's* case), there cited; *Lord Mountstewart* v. *Mackenzie*, 1707, M. 14,903; *Mackinnon* v. *Mackinnon*, 1756, M. 6566; *Mackinnon* v. *Macdonald*, 1765, M. 5279, 5 Br. Sup. 904, 1765, M. 5290; *Macdonald* v. *Mackinnon*, M. 5285; *Middlemore* v. *Macfarlane*, 5 Mar. 1811, F.C.

intestate succession,—*Grant* v. *Grant's Trustees*,[1]—the doctrine of conditional vesting was again, after an interval of half a century, brought under the consideration of the Court of Session. The result was that, without disputing the authority of the earlier cases, the judges would not extend the doctrine to intestate succession. It was therefore ruled that a father, by completing a title as heir to any of his descendants, acquires an indefeasible right to the succession,—a decision which is seen to be well founded, when it is considered that the laws of heritable succession are purely *positivi juris*, and that the vested right acquired by a father through service, or now by survivance of the ancestor, is a legal right which can only be displaced by his own act. The element of intention, which was stated to be the ground of decision in the entail cases, is of course inapplicable to cases of intestate succession.[2]

Special rules of collateral succession. Heir of line.

131. V. ORDER OF SUCCESSION IN THE COLLATERAL LINE.—In the collateral lines of succession two other rules come into operation: (1) the full-blood takes precedence of the half-blood;[3] and (2) the succession descends before ascending. Therefore, among collateral relatives of the same degree, the immediate younger brother of the intestate (or of his ancestor, as the case may be) succeeds first, with his issue; afterwards the younger brothers in their order; then the immediate elder brother; after him the other elder brothers in inverse order, with their respective issue in their order; lastly, the sisters, as heirs-portioners, in their order. On the exhaustion of the line of the full-blood, the half-blood consanguinean in the same branch of the collateral line succeed, the brothers, if younger than the intestate, in the order of seniority; if elder, then in inverse order,[4] with their respective issue in their order; then sisters of the half-blood, with their issue as heirs-portioners. The succession then ascends to the ancestor in the next higher degree, and failing him, to his collateral relatives and their descendants, in the order already specified.[5]

[1] *Grant* v. *Grant's Trs.*, 2 Dec. 1859, 22 D. 53.

[2] See also the opinions expressed by Stair, 3, 5, 50; Bankton, vol. ii. p. 339; Bell, Pr. § 1642. In *Grant's* case it is to be observed that the child was conceived as well as born after the father's service. From the opinions expressed by the judges, it is clear that a child *in utero* would have been considered to have a vested interest sufficient to prevent the father taking benefit by the service.

[3] Ersk. 3, 8, 8; Bell, Pr. § 1664; *Stenhouse* v. *Dewar*, 1686, M. 14,872.

[4] *Lady Clerkington* v. *Stewart*, 1644, M. 14,867; Stair, 3, 5, 10, citing Craig, 2, 15, 19. In *Willox* v. *Farrell*, 18 July 1846, 8 D. 1226, it was said, *arguendo*, by the pursuer's counsel (Lord Rutherfurd) that the descendant of a brother-consanguinean would exclude the descendants of a sister of the full-blood. But for the circumstance that the case is specially reported on the point, we should have considered the suggestion to be a mere mistake, as we have not been able to find any authority for it.

[5] Ersk. 3, 8, 8-9; Bell, Pr. §§ 1661-1665:

CHAPTER IV.

Succession of heirs of conquest.

132. The order of succession stated in the preceding paragraph is that of the principal line of succession. The heir in the principal line of succession is called the heir of line. The line of succession in conquest deviates from the principal line in the case of the succession devolving upon brothers of the intestate, or of his father—that is, in the two proximate collateral branches. The succession in conquest, failing issue of the intestate, goes to his immediate elder brother and his issue, then to the next elder, and so to the eldest, with their respective issue. Failing elder brothers of the intestate, the succession in conquest passes to the principal line—that is, the younger brothers succeed in the order of seniority with their respective issue, and the sisters after them.[1] In conquest, as in heritage, the full-blood excludes the half.[2] The order of succession among brothers-consanguinean is the same as in the full-blood.[3] A similar divergence occurs in the branch collateral to the intestate's father. Failing the father, the conquest goes to his immediate elder brother, and so upwards to the eldest, with their issue, after which the succession merges in the principal line. It does not appear that there is any corresponding division in the higher branches of the collateral line.[4]

133. By the 37th section of the Conveyancing (Scotland) Act, 1874, "The distinction between fees of heritage and fees of conquest is hereby abolished with respect to all successions opening after the commencement of this Act, and fees of conquest shall descend to the same persons, in the same manner, and subject to the same rules as fees of heritage."

Exclusion of the maternal line.

134. Succession in heritage never passess to the maternal line, and this exclusion applies not only to ancestors and collateral relatives of the intestate's mother, but also to the wives of his

"As by the law of Scotland the legal succession of heritage is not divided, except in the special cases to be soon explained, the brother-german next youngest to the deceased succeeds to him as heir-at-law; according to the natural rule, *heritage descends*. Where the deceased is himself the youngest brother of three or more, the succession goes to the immediate elder brother, and not to the eldest of all; because, where there is no room for heritage to descend, which is its natural course, it is the least deviation from the rule that it ascends, not *per saltum*, but by the slowest degrees." Ersk. *ut supra*, citing *Grant* v. *Grant*, 1757, M. 14,874. On the succession of heirs-portioners, see the same author, 3, 8, 13; Bell, Pr. § 1659.

[1] Stair, 3, 5, 10; Ersk. 3, 8, 14; Craig, 2, 15, 10.

[2] See Sir J. Lockhart's opinion in 1 Fount. p. 6, and 3 Br. Sup. 241.

[3] Stair, 3, 5, 10; *Lady Clerkington* v. *Stewart*, 1664, M. 14,867.

[4] Ersk. 3, 8, 14; Bell, Pr. § 1670. If the succession come from the youngest brother, the immediate elder brother is heir both of line and of conquest, failing issue of the defunct; *Robertson* v. *Lord Halkerton*, 1675, M. 5605. The distinction between heritage and conquest arises only where a middle brother or sister, or their issue, dies intestate and without issue surviving.

paternal ancestors and their relatives.[1] Even where the intestate has inherited the property from his mother or other maternal relative, it passes to his relatives on the father's side if there are no descendants, the law taking no account of the source from which the estate has come in a question as to its distribution.[2] The intestate succession of females follows the same rule as that of males. When, therefore, a heritable proprietrix dies without issue, her immediate younger brother is her heir of line, and her immediate elder brother her heir of conquest.[3] Her sisters succeed as heirs-portioners of line and of conquest, failing brothers.[4]

Explanation of the Table.

135. The annexed Table is intended to show the operation of the rules of heritable succession within the ordinary limits. The persons or branches succeed in the order of the numbers attached to their names. The numbers within brackets show the order of succession in relation to conquest.

[1] Craig, 2, 17, 9, and *Gilbert's* case, there cited; Stair, 3, 4, 5; *Lennox* v. *Linton*, 1663, M. 14,867; Ersk. 3, 8, 9-10.

[2] *Lennox* v. *Linton*, *supra*, where it was held that a brother-uterine could not succeed to estate which had come from the mother, for, says the reporter, "we have no uterine succession, neither holds it with us *materna maternis, paterna paternis*."

[3] Stair, 3, 4, 33; *Robertson* v. *Lord Halkerton*, 1675, M. 5605; *Cuninghame* v. *Cuninghame*, 1770, M. 14,875, where the succession of a lady's conquest heriage was found to belong to the son of her immediate elder brother, *jure representationis*. In this case it seems to have been erroneously assumed that the *eldest* brother was the "heir general and of line."

[4] Ersk. 3, 8, 15; *Carse* v. *Russel*, 1717, M. 14,873.

TABLE OF DESCENT.

34. Collateral relatives of full blood, as below. — Paternal Great 33. Grandfather. — 35. Collateral relatives of half blood, as below.

31. Grandfather's Sisters of full blood, and their descendants. — 30. Grandfather's Elder Brothers in inverse order, and their descendants (full blood). — Paternal 28. Grandfather. — 29. Grandfather's Younger Brothers in order of birth, and their descendants (full blood). — 32. Grandfather's Brothers and Sisters of half blood in order of proximity of birth, and their descendants.

26. Father's Sisters, full blood, and their descendants. — 25. (23.) Father's Eldest Brother, full blood, and his descendants. — 24. (22.) Father's immediate Elder Brother, full blood, and his descendants. — 21. Father. — 22. (24.) Father's immediate Younger Brother, full blood, and his descendants. — 23. (25.) Father's Youngest Brother, f. blood, and his descendants. — 27. Father's Brothers and Sisters, half blood, in order of proximity, and their descendants.

19. Sisters, full blood, and their descendants. — 18. (16.) Eldest Brother, full blood, and his descendants. — 17. (15.) Immediate Elder Brother, full blood, and descendants. — **Person last seised.** — 15. (17.) Immediate Younger Brother, full blood and descendants. — 16. (18.) Youngest Brother, full blood, and his descendants. — 20. Brothers and Sisters, half blood (the former in order of proximity), and their descendants.

1. Eldest Son by First Marriage.
2. Eldest Son and descendants.
3. Younger Son and descendants.
4. Daughters and descendants.

5. Younger Son by First Marriage.
6. Eldest Son and descendants.
7. Younger Son and descendants.
8. Daughters and descendants.

9. Son by a Second Marriage.
10. Eldest Son and descendants.
11. Younger Son and descendants.
12. Daughters and descendants.

13. Daughters by both or either Marriage.
14. Nearest descendants of each Daughter take shares which would have fallen to their respective ancestors.

The numbers within brackets denote the order of Succession in Conquest as distinguished from Succession in Heritage.

Succession of the Sovereign as *ultimus hæres.*

136. VI. CADUCIARY RIGHT OF THE CROWN.—The Sovereign, in the character of last heir, is entitled to the property, both heritable and moveable, of any one who dies intestate and without lawful heirs to take up his succession.[1] The Crown also succeeds as last heir to a bastard who dies intestate and without heirs of his body; for a bastard, having no recognised descent, can have no heirs either in the ascending or collateral lines.[2] The ground of the Crown's title is the same in both cases, except that in the latter case the failure of the ascending and collateral lines of heirs results from bastardy, while in the former it results from the extinction by death of these branches of the succession, or the impossibility of tracing the line of succession in these branches.

Gifts to Crown donatories.

137. The Crown usually names a donatory, upon application by the parties interested to the Exchequer. In the case of failure of heirs by bastardy, a preference is usually given to the nearest relatives in the paternal line—that is, of the reputed father. Gifts of *ultima hæres* are usually bestowed on the nearest relatives in the maternal line, in respect of the extinction of the paternal line, but the Crown is not bound to conform strictly to the analogy of the legal course of succession, or indeed to make a gift at all. A brother or sister uterine of the deceased, if such exist, is considered to have an equitable claim.

Legal character of the Sovereign's right.

138. It has been observed by Professor Bell[3] that the right of *ultima hæres* is not properly a right of succession. But it appears that it has been so interpreted in some cases. Thus it has been held that the donatory of the Crown may pursue a reduction *ex capite lecti*, though this is a privilege competent only to heirs.[4] In the latest of the cases cited, the Court intimated that the point was settled by the decision in *Goldie* v. *Murray*, which had been affirmed by the House of Lords, and would not entertain any argument on the subject. The Sovereign, as *ultima hæres*, does not represent

[1] Stair, 3, 3, 47; More's Notes, 33; Ersk. 3, 10, 2; Bell, Pr. § 1669. According to the law of England, freehold property, upon failure of heirs, escheats to the Crown, unless an overlord can be traced, which is seldom the case. Copyhold estate in the same circumstances escheats to the lord of the manor. But before these rights take effect, the different maternal lines of ascendants and collaterals must be exhausted, beginning with that one which is nearest to the most remote paternal ancestor, and proceeding downwards to the intestate's mother and her relatives. See the two lines of succession compared in Paterson's English and Scotch Law, pp. 254-7, and Table, *supra*, p. 78.

[2] Stair, 3, 3, 44; Ersk. 3, 10, 5.

[3] Bell, Pr. § 1669. The observation is correct in this sense, that the Crown will not succeed under a *destination* to heirs; *Torrie* v. *King's Remembrancer*, 31 May 1832, 10 Sh. 597.

[4] *Goldie* v. *Murray*, 1753, M. 3183; *Brock* v. *Cochrane*, 2 Feb. 1809, F.C.; and see *Begg* v. *Arnot*, 1741, M. 3182. The rule extends to gifts of bastardy; Stair, 4, 12, 3; Ersk. 3, 10, 5.

the deceased universally, and is only liable for his debts *secundum vires hæreditatis*. The donatory has the benefit of this privilege.[1]

Crown donatory considered an assignee.

139. The donatory is subject to the disabilities of an assignee, and, consequently, cannot take up a lease which is granted to heirs excluding assignees.[2] Mr. Hunter was of opinion that this rule would not extend to the donatory of a lease which had accrued to the Crown by forfeiture.[3]

Completion of the donatory's title.

140. In order to complete a title to caduciary estate, the Crown donatory must obtain a gift from Exchequer, with power to sue a declarator of *ultima hæres* or bastardy, as the case may be. The action is executed against the lieges. If the intestate leaves a widow she must be cited, she being a party interested to the extent of her terce. After decree of declarator, the donatory obtains a letter under the quarter seal charging the superior to give him an entry. Creditors sometimes apply for a gift of their debtor's estate, or they may attach it by diligence in the ordinary way, calling the Officers of State as representing the Crown.[4]

Whether the right originated in the King's position of superior.

141. The law of *ultimus hæres* appears to have undergone considerable changes since the time of the earlier institutional writers. Craig, building upon the ancient theory of feudal property as having originated in voluntary grants, lays down that heritable estate reverts to the superior on failure of heirs ;[5] and this assertion is repeated by Lord Kames,[6] although the true doctrine had previously been enunciated by Stair, who explains that the King by his royal prerogative excludes all other superiors, unless by express provision of the investiture the fee be provided to heirs-male or of tailzie, which failing, to return to the superior.[7]

No limit recognised in the computation of propinquity.

142. The notion, derived from the Book of the Feus,[8] that legal propinquity did not extend beyond the seventh degree, was never the law of Scotland.[9] It was once, however, erroneously decided that an estate destined to heirs-male fell to the Crown on the extinction of the male line, instead of resulting to the heir-at-law.[10] This doctrine was condemned by Bankton,[11] and does not receive any countenance from modern decisions or from works of authority.

[1] *Galbraith* v. *Deans*, 1685, M. 1354 ; and see Ersk. 3, 10, 4.

[2] *Falconer* v. *Hay*, 1789, M. 1355.

[3] 1 Landlord and Tenant, 3d ed. 187.

[4] Ross's Bell's Law Dict. *voce* "Last Heir." See also authorities cited in Stair, 3, 3, 47, and *Reid* v. *Officers of State*, 1747, M. 1355.

[5] Craig, 2, 17, 11.

[6] Stat. Law, *voce* "*Ultimus Hæres.*"

[7] Stair, 3, 3, 47.

[8] Lib. Feud. 1, 1, 4 ; and see Craig, 2, 17, 11.

[9] Stair, 3, 3, 47 ; Ersk. 3, 10, 2.

[10] *Tennent* v. *Tennent*, 1688, M. 14,897.

[11] Bankton, vol. ii. 284.

SECTION II.

Division of the Heritable Succession.
(Heirs of Line and of Conquest: Heirs-Portioners.)

Division between heirs of line and of conquest.

143. I. Heirs of Line and of Conquest.—The difference between the lines of succession in heritage and conquest has been already explained.[1] We have still to consider what parts of the succession fall to the heirs in these respective lines in cases where the succession is divided, and it has been thought proper to preserve what was published in 1868 under this head, because, although under the operation of the Conveyancing (Scotland) Act, 1874, section 37, fees of conquest are for the future to descend as if they were fees of heritage, it is easy to see that questions may arise depending on successions which had vested in an heir of conquest, or had been transmitted through him before the date of the commencement of the Act.

Heir of conquest takes estate acquired by purchase or singular title.

144. The general rule is, that whatever the intestate acquired, whether by purchase or by gratuitous disposition, from a stranger, or from a kinsman to whom he would not by law succeed, goes to the heir of conquest, provided it is estate capable of being feudalised; while estate to which the deceased succeeded as heir-at-law or heir of provision, as well as estate not requiring infeftment and titles of honour, are inherited by the heir of line.[2] Conquest, in descending from the heir of conquest to his heir, becomes heritage,[3] and this whether it descends *ab intestato* or by virtue of a destination to the heirs and assignees, or heirs whatsoever, of the person last seized.[4] But where an heir of conquest had possessed on apparency only, and died without having made up a title to his ancestor's estate, the succession remained *in hæreditate jacente* of the ancestor and passed to his next heir of conquest.[5]

Succession to

145. Estate acquired in fee-simple under the Entail Amend-

[1] *Supra*, Chapter IV., Section I.

[2] Lib. Feud. 2, 50; Craig, 1, 10, 26; Stair, 3, 5, 10; Bell, Pr. § 1671 (5th ed. § 1670).

[3] Stair, 3, 5, 10; Ersk. 3, 8, 15; Bell, Pr. § 1675.

[4] *Boyd* v. *Boyd*, 1774, M. 3070 (2d point). The case of conquest becoming heritage at the second change in the succession furnishes an example of an elder brother succeeding to a younger as heir of line. For, suppose the youngest of three brothers to acquire property by purchase and to die intestate, the immediate elder brother succeeds him as heir of conquest. On the death of the latter, the eldest brother takes the succession (which has now become heritage) in the character of heir of line. The tendency of the combined rules of succession in heritage and conquest is ultimately to unite the property acquired by different members of a family, and thus to promote the aggregation of estates. See Ersk. 3, 8, 14.

[5] *Aitchison* v. *Aitchison*, 7 March 1829, 7 S. 558; *Boyd* v. *Boyd*, *supra* (1st point).

estate disentailed by heir or acquired under declarator.

ment Acts by an heir-substitute of entail would be heritage in his person, because he would still hold under the entail, the effect of the decree being merely to evacuate the ulterior destination. Entailed estate similarly acquired by an institute who was not the heir of the granter *alioqui successurus*, would, on the same view, be conquest in his person.

Destinations, whether operative in favour of heir of conquest.

146. It may be convenient to state the distinctions which have been recognised in relation to the succession of collaterals under destinations to heirs whatsoever, where the property is conquest in the person of the disponee. The destination may either be to the heirs of the granter or to those of a person previously nominated, and the heir designated may succeed either as a conditional institute or as a substitute. These destinctions present four cases: (1.) Where the destination is to the granter's heirs, failing others previously nominated, and the succession opens to heirs as *conditional institutes*. This is the point decided in the first branch of *Boyd* v. *Boyd*,[1] where it was held that, as the immediate disponee had failed to make up a sufficient title to certain estate, the property remained *in hæreditate jacente* of the granter, and therefore, and in respect the said land was a *feudum novum* in him, the property thereof devolved and fell to his heir of conquest.[2] This doctrine subsequently received the sanction of Lord Neaves and the Second Division of the Court in a case to which we are immediately to refer.[3] (2.) Where the destination is to the granter's heirs on the failure of those previously nominated, and the succession opens to the former as *substitutes*. This was the point decided in *Robison's* case,[4] in favour of the heir of line. The principle is, that after the estate has vested by inheritance in an heir, it ceases to be conquest of the granter; and that the expression heirs of the granter must then be construed *designativé*, and in that sense it is applicable to the heir of line. (3.) In the case of *Miller* v. *Miller's Trustees*,[5] the destination was to a *nominatim* disponee, whom failing, to the heirs whatsoever of the disponee. The disponee predeceased the granter, and the succession therefore opened to his heir in the character of *conditional institute*. The judgment of the Court was in favour of the heir of line, and their judgment was affirmed on appeal. Here the estate could not be conquest of the disponee,

[1] *Boyd* v. *Boyd*, *supra* (1st point). It is here assumed that John Boyd, the fiar or purchaser, was the true granter of the destination.

[2] M. 3072. The grounds of the decision upon all the points are stated in the interlocutor of the Lord Ordinary.

[3] *Robison* v. *Robison*, 3 June 1859, 21 D. 905.

[4] *Robison* v. *Robison*, *supra*.

[5] *Miller* v. *Miller's Trs.*, 19 Jan. 1831, 7 W. & S. 1, affg. 9 Sh. 295. This decision is in conformity with the judgment in *Boyd's* case, *supra*, on the third point, M. 3072; *Short* v. *Short*, 1771, M. 5615, is overruled.

because the estate never vested in him ; hence "heir" must be construed *designativé*, and is applicable to the principal line of the succession. (4.) In the case last cited, it was observed by the Lord Justice-Clerk that if the succession had vested in the party named as institute, being conquest in his person, his heir of conquest would have been the party entitled to take it up as *first substitute* under the destination to heirs, and this principle was given effect to in the subsequent case of *Brown* v. *Campbell*.[1] It will be seen from the decisions that these rules apply to heritable succession under trust-deeds as well as under deeds of direct conveyance.

Distinction where the immediate ancestor was heir *alioqui*.

147. Subjects to which the intestate might have succeeded as heir-at-law do not become conquest in his person by reason of his having actually acquired them from his ancestor by a gratuitous disposition, whether *inter vivos* or *intuitu mortis*.[2] Estate purchased from an ancestor is understood to be conquest. According to Craig,[3] whose statement of the law is adopted by Erskine, it would appear that estate acquired by gift *inter vivos* from a collateral relative ought to be accounted conquest, because the donee is not necessarily his heir-presumptive at the time of the grant, even if he should become so at the death of the granter.[4]

What subjects pass as conquest succession.

148. With regard to the subjects which are comprehended in conquest, the following distinctions have been recognised:—As already stated, conquest includes only subjects to which a title has been completed by infeftment, or which require infeftment to complete it.[5] Under this rule are comprehended bonds and dispositions in security, heritable bonds,[6] adjudications,[7] property of which the title is taken in the name of a trustee, although without a written acknowledgment of trust,[8] and also heritable rights under trust-dispositions.[9] Heritable estate which does not require infeft-

[1] *Brown* v. *Campbell*, 16 March 1855, 17 D. 759. The heir of conquest can never succeed under a destination to A. B. and his heirs, if his predecessor have served heir-substitute of provision under the deed. The principle of this decision must therefore be confined to the case of an heir claiming as *first* substitute.

[2] Stair, 3, 5, 10 ; Ersk. 3, 8, 15 ; Bell, Pr. § 1673.

[3] Craig, 2, 15, 17 ; Ersk. *ut supra*.

[4] "An heritable grant by one who has no lawful issue in favour of a brother ought to be accounted conquest in the grantee, unless the grant has been expressly made over to him as the granter's successor. For though the disponee was at the date of the right the disponer's presumptive heir, the disponer might have afterwards had issue of his own body, who would have been nearer in blood to him than the disponee."—Ersk. 3, 8, 15.

[5] *Supra*, § 144. See Ersk. 3, 8, 16 ; Bell, Pr. § 1672.

[6] *A* v. *B*, 1676, M. 5608 ; *Menzies* v. *Menzies*, 1738, M. 5614 ; Elch. Her & C. 2 ; *E. of Selkirk* v. *D. of Hamilton*, 1740, M. 5615, 5 Br. Sup. 684, 695, affd. 1 Cr. St. & P. 271.

[7] *A* v. *B*, 1675, M. 5608 ; *Anderson* v. *Anderson*, 1677, M. 5609 ; *E. of Selkirk* v. *D. of Hamilton*, *supra*.

[8] *E. of Selkirk* v. *D. of Hamilton*, *supra*.

[9] *Miller* v. *Miller's Trs.*, 19 Jan. 1831, 9 Sh. 295, and 7 W. & S. 1 ; *Brown* v. *Campbell*, 16 March 1855, 17 D. 759.

CHAPTER IV.

ment is not conquest, but belongs to the heir of line,—as leases,[1] pensions,[2] and personal bonds to heirs secluding executors.[3] These last are supposed to belong to the heir in heritage *designativé* on the principle already explained in treating of the succession in heritage and conquest under destinations.[4] Under the head of rights requiring infeftment we may now include rights constituted by deeds which may be recorded in the Register of Sasines under the provisions of the Conveyancing Statutes,[5] and perhaps also leasehold property recorded in the same register.[6]

Teinds whether capable of becoming conquest succession.

149. It is asserted by Erskine,[7] whom Bell has followed,[8] that teinds do not fall under conquest, because they are a burden not on the ground, but on the crop. But the authorities cited by these authors do not bear out the proposition. In the earliest case on the point the question was as to a purchase of the teinds of the *intestate's lands*,[9] and the Lords found, in respect of an indication of intention in the title, "that the teinds descended to the heir of line who succeeded in the lands, and would have been of the same opinion (without that specialty) wherever one purchases the teinds of his own lands, that it is *eo animo* to let them descend to the same heirs." The decision in the leading case of the *Earl of Selkirk* v. *The Duke of Hamilton*,[10] was put on the same ground. It would appear, therefore, that the teinds of conquest lands, when separately acquired, ought to descend to the heir of conquest; and where teinds are conveyed in the same instrument with the lands, they will of course go to the same heir. With regard to rights of titularity and teinds unconnected with the intestate's landed estate, it would seem that these, if not feudalised, are to be regarded as heritage. It has been held that the purchase of the property of lands whereof the purchaser had inherited the superiority, with the intention of consolidating, impressed the character of heritage on the conquest lands.[11]

Udal property.

150. Udal property, which is held by possession on a disposition without infeftment, and which vests without service, would seem, according to the analogy of leases, to be excluded from the

[1] *E. of Dunbar's Heirs*, 1625, M. 5605; *Ferguson* v. *Ferguson*, 1663, M. 5605.

[2] Ersk. 3, 8, 16.

[3] *Begbie* v. *Begbie*, 1706, M. 5609; *E. of Selkirk* v. *D. of Hamilton*, *supra*.

[4] Ersk. 3, 8, 16. See observation of the same author upon Wadsets, *id. pl.*

[5] Shaw's Bell's Com., p. 1029, editor's note (*d*).

[6] *Id.* See the Act, 20 and 21 Vict., cap. 26.

[7] Ersk. 3, 8, 16.

[8] Bell, Pr., § 1672.

[9] *Greenock* v. *Greenock*, 1736, Elch., Her. and Con. 1; M. 5612.

[10] *E. of Selkirk* v. *D. of Hamilton*, 1760, M. 5615; 1 Cr. St. & P. 271.

[11] Same case. The different points of the judgment are well summarised in Elchies, *voce* "Heritage and Conquest," No. 3. All were affirmed on appeal.

category of conquest heritage. But we have not been able to find any authority on the subject; and in the only cases reported upon succession to udal property [1] the state of the pedigree was such that the succession in heritage and conquest flowed in the same line.

Estates of heirs portioners. *Jus præcipui.*

151. II. HEIRS-PORTIONERS.—Heirs-portioners [2] take the succession as *pro indiviso* proprietors in equal shares. Their estate is not of the nature of a joint interest, but, as the name imports, that of part-owners or portioners.[3] There is therefore no *jus accrescendi* in respect of their succession, but each heir-portioner transmits her share to her heir-at-law. Another consequence of the nature of the right is, that, as it is a right in severalty, each heir-portioner has a title to pursue in questions with third parties in relation to the property,[4] contrary to the rule in actions at the instance of joint proprietors.[5] And whilst the estate continues to be possessed in common, the law recognises a separate right of property on the part of the eldest heir-portioner in relation to those indivisible subjects which would fall to her *jure præcipui* on a division of the estate. The eldest heir-portioner is therefore the proper party to grant entries to vassals,[6] though, if the heirs-portioners should concur in offering a charter in their joint names, the vassal is bound to accept of it, for he is "not obliged to take infeftment severally from the heirs-portioners of the superior, but either from the whole jointly or from the eldest by the prerogative of her birth." [7]

Division of the succession under brieves of division.

152. Any of the heirs-portioners may insist on having the succession divided, which is accomplished by the Sheriff and a jury acting under a brieve of division.[8] The brieve is not retourable to

[1] *Rendall* v. *Robertson*, 15 Dec. 1836, 15 Sh. 265; *Beatton* v. *Gaudie*, 2 Feb. 1842, 10 Sh. 286.

[2] For the rules according to which heirs-portioners inherit, reference is made to the preceding section, *supra*, § 127.

[3] *Cargill* v. *Muir*, 21 Jan. 1837, 15 Sh. 408; *M'Neight* v. *Lockhart*, 30 Nov. 1843, 6 D. 128, 136, per L. J.-C. Hope. "Heirs-portioners are not joint proprietors, but, as their name imports, *part-owners*, or portioners. They hold *pro indiviso*, while the subject is undivided. But each has a title in herself to her own part or share, which she may alienate or burden by her own separate act. The condition of two *joint proprietors* in the fee is very different; they have no separate estates, but only one estate vested in both, not merely *pro indiviso* in respect of possession, but altogether *pro indiviso* in respect of the right. The distinction is the same which the Lord Ordinary believes is expressed by English lawyers by the terms joint tenants and *tenants in common*." Lord Moncreiff's note in *Cargill*, *supra*.

[4] See *Lawson* v. *Leith and Newcastle Packet Co.*, 26 Nov. 1850, 13 D. 175.

[5] *Johnston* v. *Crawford*, 3 July 1855, 7 D. 1023.

[6] Stair, 3, 5, 11; Ersk. 3, 8, 13; *Lady Luss* v. *Inglis*, *infra*.

[7] *Lady Luss* v. *Inglis*, 1678, M. 15,028. *Joint proprietors* of a superiority must concur in granting an entry, and if they do so there is no splitting of the superiority; *Cargill* v. *Muir*, *supra*.

[8] Stair, 4, 3, 10-12. For the form of the brieve see 1 Jurid. Styles, 4th ed. 330, and Stair, 4, 3, 12.

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Chancery, and, on this ground it is held that the proceedings are not subject to review by advocation after the verdict, but only by way of reduction.[1] The eldest heir-portioner is entitled to the portion next the mansion-house; the others cast lots for their choice. The Court will not assign shares to the heirs; they must either agree as to the distribution, or let it be settled by chance.[2]

Titles of honour and indivisible subjects.

153. The rule of equal division amongst heirs-portioners suffers an exception in the case of peerages and titles of honour, which, unless otherwise limited, descend to the eldest;[3] and also in the case of the distribution of certain subjects which the law regards as indivisible. With regard to indivisible subjects, the law appears to be that, until a division takes place, they are to be enjoyed in common by all the heirs-portioners. Therefore, casualties of superiority falling due whilst the heirs are possessing *pro indiviso* are subject to division,[4] and entries may be given to vassals by the heirs-portioners jointly.[5] Upon a division, the eldest heir-portioner is entitled to indivisible subjects as a *præcipuum*. The annual profits of such subjects, when received in money, as feu-duties, are to be shared with the other heirs-portioners, or compensation given. But subjects which are intended for the personal use of the proprietor, as a mansion-house and its appurtenances, and subjects yielding only casual profits, as blench superiorities, fall to the eldest heir-portioner *jure præcipui*, without recompense.

What subjects are comprehended in the *jus præcipui*.

154. In the application of these principles the following points have been determined:—(1) The benefit of a *præcipuum* belongs only to the eldest sister (or her representative) succeeding as an heir-portioner, not to the eldest of a family of sisters to whom property is destined as joint disponees.[6] Sisters or their representatives succeeding to settled estate under a destination to heirs whatsoever, in a settlement,[7] or deed of entail,[8] take as heirs-portioners, and the eldest is entitled to a *præcipuum*. (2) The mansion-house, or principal messuage of a landed estate, with the offices and ground occupied in connection with it, belong to the eldest heir-portioner as a *præcipuum*,[9]—the garden, avenue and

[1] *M'Neight* v. *Lockhart*, 6 D. 139, per Lord Justice-Clerk Hope; *Cathcart* v. *Rocheid*, 1772, M. 7663.

[2] *Lady Houston* v. *Dunbar*, 1742, M. 5366; *Inglis* v. *Inglis*, 1781, Hume, 762.

[3] Ersk. 3, 8, 13; Bell, Pr. § 1659.

[4] *Fenton* v. *Dirleton's Heirs*, 1523, M. 5357. See remarks on this case per Lord Justice-Clerk Hope in *M'Neight* v. *Lockhart*, 6 D. 136.

[5] *Lady Luss* v. *Inglis*, 1678, M. 15,028.

[6] *Cathcart* v. *Rocheid*, 1773, M. 5375.

[7] *Wight* v. *Inglis*, 1798, M. "Heir-Portioner," App. No. 1; *Maclauchlane* v. *Maclauchlane*, 1807, *id. pl.* No. 3.

[8] *Dennistoun* v. *Welsh*, 17 June 1830, 8 Sh. 935. This is a result of the rule of law that heirs whatsoever take the estate in fee-simple.

[9] Stair, 3, 5, 11; Ersk. 3, 8, 13; *Cowie* v. *Cowie*, 1707, M. 5362, 2453; *Forbes* v. *Forbes*, 1774, M. 5378; *Ireland* v. *Govan*, 1765, M. 5373; *Dennistoun* v. *Welsh*, *supra*.

orchard[1] of the mansion, if not let,[2] being included. The second sister has no right to a second messuage.[3] The eldest has no right to a house in town or to a country villa; and if there is adjacent property capable of being divided, the dwelling-house must be included in the partition, and taken at its value.[4] It was held that a country house which had been let by the ancestor of the heirs-portioners, but which had formerly been used as the mansion-house of a larger estate, could not be claimed as a *præcipuum;* and the opinion was expressed that no house could be claimed as such which had not been used as a residence by the person to whom the heirs-portioners succeeded.[5] (3) There is no *præcipuum* of heirship moveables.[6] (4) Patronages, when falling to heirs-portioners, are to be exercised in the same manner as by joint proprietors. The heirs-portioners will therefore present to the benefice, and levy the vacant stipend by turns, the first *vice* or turn falling to the eldest.[7] Titularities of teinds falling to the patron under the Statute 1693, cap. 25, would, we presume, be divided like other property. (5) The eldest sister has the custody of the title-deeds of the estate, and must give transumpts when required, she herself bearing an equal share of the expense.[8] This right she does not lose although a younger sister may have acquired a larger interest in the estate by a subsequent arrangement.[9]

Mode of division of superiorities.

155. (6) The eldest heir-portioner has a preferable right to a superiority, with its casualties and feu-duties; but with regard to the latter, says Erskine, "because they are a fixed yearly rent, and so of a different nature from the casualties of superiority which depend upon accidents, the younger sisters have compensation for their shares of them out of the other estate of the deceased."[10] In *Lady Houston* v. *Dunbar*, a leading case in this branch of the law, the Lords found "that the eldest heir-portioner is entitled to one of the superiorities and the feu-duties arising therefrom, and that she is entitled to make her election; that the second heir-portioner is entitled to the other superiority and the feu-duties arising there-

[1] *Pedie* v. *Pedies*, 1743, M. 5367; Elch. "Heir-Portioner," No. 1; 5 Br. Sup. 728; *Chalmers* v. *Chalmers*, 1750, M. 5369, note; Elch. "Heir-Portioner," No. 5.

[2] *Cowie* v. *Cowie*, *supra.*

[3] *Inglis* v. *Inglis*, 1781, Hume, 762.

[4] *Hawthorn* v. *Gordon*, 1696, M. 5361; *Wallace* v. *Wallace*, 1758, M. 5371; *Smith* v. *Wilson*, 1792, M. 5381; *Rae* v. *Rae*, 1809, Hume, 764, and *Thomson* v. *Angus*, there cited.

[5] *Halbert* v. *Dickson*, 28 May 1857, 19 D. 762.

[6] *Lady Garnkirk* v. *Grey*, 1725, M. 5366; *Maclauchlane* v. *Maclauchlane*, 1807, M. "Heir-Portioner," App. No. 3; *Cruickshanks* v. *Cruickshanks*, 1801, *id. tit.* No. 2, overruling Ersk. 3, 8, 13 and 17.

[7] Ersk. 3, 8, 13.

[8] *Lady Cunninghame* v. *Lady Cardross*, 1680, M. 2449; *Cowies* v. *Cowie*, 1708, M. 2453; Ersk., *supra.*

[9] *Denholm* v. *Denholms*, 1638, M. 2447.

[10] Ersk. 3, 8, 13; *Lady Houston* v. *Dunbar*, *infra.* And see Stair, 3, 5, 11, and *Lady Luss* v. *Inglis*, 1678, M. 15,028.

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from; and that the third heir-portioner is entitled to a recompense from the other two heirs-portioners for her proportion of the feu-duties."[1] In the subsequent case of *Chalmers*, where there was also a plurality of superiorities, a hearing in presence was ordered on the question whether these should be divided as far as could be without splitting any one superiority, or whether the whole must go to the eldest, and the younger sisters have a recompense for the feu-duties. The case was compromised without a decision being given on the point.[2]

Casualties fall to the eldest heir-portioner.

156. In the case of *Rae* v. *Rae*,[3] it was ruled that superiorities to which substantial feu-duties were attached fell to be equally divided. The question as to the right to casualties of superiority remained open until 1843, when it was finally determined, first, that superiorities yielding feu-duties were to be divided; and, secondly, that the eldest heir-portioner was entitled to a blench superiority as a *præcipuum*, in addition to her share of the former, and without making compensation.[4] This case was decided on the view that the principle of division among heirs-portioners is not that of perfect equality; that the law does not contemplate contribution in the shape of money, with a view to equal distribution; and that while subjects yielding a fixed yearly return may reasonably be merged in the general division, the eldest heir is entitled to the advantages in expectancy which flow from her general title as superior, and which could only be compensated by a money payment on the basis of the estimated present value of the casualties.[5]

Whether the *præcipuum* belongs to eldest taker by representation.

157. In the event of an intestate heritable succession being divisible between a younger sister and her nieces, being daughters of an elder sister succeeding by representation, it may be doubted whether the *jus præcipui* would belong to the two nieces jointly or to the eldest only. This question does not appear to have been raised in any of the cases.

SECTION III.

Of Terce.

Definition of terce. How the right accrues.

158. Terce is a liferent of a third part of the estate in which a proprietor dies infeft in fee, accruing to his widow as a legal provision. Terce and courtesy are termed legal liferents. At com-

[1] *Lady Houston* v. *Dunbar*, 1744, M. 5369.

[2] *Chalmers* v. *Chalmers*, 1750, Elch. "Heir-Portioner," No. 5; Lord Dromore's Session Papers, cited by Lord Justice-Clerk Hope, 6 D. 138.

[3] *Rae* v. *Rae*, 1809, Hume, 764.

[4] *M'Neight* v. *Lockhart*, 30 Nov. 1843, 6 D. 128.

[5] See the opinion of Lord Justice-Clerk Hope, 6 D. 135.

mon law terce was not due unless the marriage had subsisted for a year and day, or had been followed by the birth of a living child.[1] But by the Moveable Succession Act [2] marriages dissolved within the period of a year and day are placed on the same footing, as regards the rights of the survivor and the representatives of the predeceaser, as marriages which have subsisted for that period. At common law terce was not claimable from burgage subjects,[3] but by the Conjugal Rights Act[4] the widow of any person dying infeft in property held by burgage tenure, after the date of the Act, is entitled to claim terce, and may take proceedings for service and kenning before the Sheriff. Terce is therefore now due irrespective of the tenure of the property, and of the period of subsistence of the marriage. It is grounded on the obligation incumbent on a landed proprietor to make a reasonable provision for his widow suitable to his circumstances and condition of life.

Effect of divorce in relation to terce and courtesy.

159. By the operation of the Act of the Scottish Parliament 1573, cap. 55, by which desertion was made a cause of divorce, the offending party loses his or her conventional provisions. The same rule has been applied in the case of a divorce granted on the ground of adultery; and the authority of Stair and Bankton, cited with approval by the Lord Justice-Clerk Hope and Lord Medwyn in the case of *Thom* v. *Thom*, may be regarded as conclusive of the proposition, that legal as well as conventional provisions are due from the offending to the injured party, upon a decree of divorce.[5]

Legal character of the provision.

160. The nature of the right to this as well as other legal provisions has been much discussed. In substance it is, as above described, a legal provision out of the heritable succession. In point of form it approaches most nearly to the character of a real burden, being constituted by the husband's infeftment, which is said to be the measure and security of the right.[6] In another respect it resembles a real burden by reservation; for while, on the one hand, it is made effectual without any separate title in the person of the tercer; on the other, it gives no title of occupation or active right until a separate title has been made up in the manner afterwards mentioned. It will be afterwards seen that the right

[1] Stair, 2, 6, 17; Ersk. 2, 9, 51; Bell, Pr. § 1595-7.

[2] 18 Vict., cap. 23, § 7.

[3] Stair, 2, 6, 16; Ersk. 2, 9, 49; *Lowthian* v. *Aglionby*, 1801, M. "Annual-rent," App. No. 2.

[4] 24 and 25 Vict., cap. 86, § 12. In 1874 (since this paragraph was written) the special tenure of burgage is itself abrogated, or assimilated to feu tenure (Conveyancing (Scotland) Act, 1874, § 25).

[5] Stair, 1, 4, 20; 1 Bankton, 140; 1 Fraser, 688; *Greenhill* v. *Ford*, 15 Feb. 1826, 4 Sh. 472, N.E. 478; *Thom* v. *Thom*, 11 June 1852, 14 D. 861; *Johnstone* v. *Beattie-Johnstone*, 5 Feb. 1867, 5 M. 340, 6 M. 333. The subject does not properly fall within the scope of this book.

[6] Ersk. 2, 9, 46.

vests absolutely by survivance, and cannot be defeated by any act of the husband to which the wife has not assented. It is understood that the old law, by which aliens were debarred from holding heritable property in Scotland, extended to the right of terce;[1] but by the Alien Act of the present reign[2] it is enacted that any woman married, or who shall be married, to a natural-born subject or person naturalised, shall be deemed and taken to be herself naturalised, and shall have all the rights and privileges of a natural-born subject.

From what estate terce is claimable.

161. Terce, unlike the correlative right of courtesy, is due from conquest as well as from heritage.[3] It is due whether the estate was acquired by the husband as heir or as purchaser; and it appears that an exclusion of terce is not implied from the nature of a settlement in strict entail, though the right may be barred by a clause of exclusion in the deed of entail. Where terce is not excluded, an heir of entail may grant an annuity or liferent by way of locality within the amount of the legal provision.[4] In practice, terce is excluded in modern entails. The decisions appear to be conflicting as to the efficacy of an exclusion of terce in a settlement defective in the essentials of a valid and effectual entail;[5] but the question is not now of much practical importance, as in all such cases the heir in possession has the power of acquiring the estate in fee-simple under the provisions of the Entail Amendment Act, which would make the estate subject to legal provisions.[6]

Residential subjects, securities, and real burdens.

162. In the case of a landed estate, the mansion-house and garden, or other ornamental ground possessed with it, are held free of terce; but the exception does not extend to fields or orchards capable of being possessed with the mansion-house, but actually let.[7] Terce may be claimed by the widow of a heritable creditor infeft;[8] and it appears that, in the event of the sum in the bond being paid up, the widow would be entitled to have her share reinvested on securities of the same kind in favour of herself in liferent, and the heir in fee.[9] The widow of a wadsetter was held entitled to terce, but the widow of the reverser was considered to

[1] *Stewart* v. *Hoome*, 1792, M. 4649; *Nisbet* v. *Nisbet's Trs.*, 16 Jan. 1834, 12 Sh. 293.

[2] 7 and 8 Vict., cap. 66, § 16.

[3] Ersk. 2, 9, 45; 1 Bell, Com. 59, 7th ed., 57.

[4] *Cant* v. *Borthwick*, 1726, M, 15,554; *Noble* v. *Dewar*, 1758, M. 15,606.

[5] *Kerr* v. *Reid*, 1795, Bell, Fol. Ca. 195; *Macgill* v. *Macgill*, 1798, M. 15,451; and *contra*, *Anderson* v. *Wishart*, 1715, M. 13,570.

[6] *Hay Newton* v. *Newton*, 1867, 5 M. 1066; May 9, 1870, 8 M. (H.L.) 66.

[7] *Moncrieff* v. *Newton*, 1677, M. 15,733.

[8] Stair, 2, 6, 16; Ersk. 2, 9, 48; *Tenants of East Houses* v. *Hepburn*, 1627, M. 15,838. Under heritable securities we include bonds of annuity and debts secured by adjudication. The right is not affected by the Statute of 1868.

[9] See Stair, 2, 6, 17; Ersk. 2, 9, 48.

have no claim unless the loan were paid up by the heir and the burden extinguished.[1] With regard to real burdens, Professor Bell has observed that these do not seem to be comprehended within the description of subjects liable to terce,[2] apparently on the ground that the infeftment in property upon which a real burden is constituted is the infeftment of the proprietor only, and not of the grantee of the burden. Tercers have also been held entitled to the use of servitudes attaching to the estate to an extent commensurate with their rights.[3]

Whether terce is due from estates vested in trustees and liferenters.

163. The infeftment of a trustee for the benefit of the real proprietor is in this question equivalent to the infeftment of the proprietor himself. In such cases terce is equally due, whether the trustee be infeft on a regular deed of trust,[4] or on an *ex facie* absolute disposition qualified by an unrecorded back-bond.[5] The principle has been extended to various cases in which interests in heritable estate have been created of a nature not inconsistent with the retention and enjoyment of the substantial right in the property. Thus, where an estate was disponed to the granter in liferent and his son *nominatim* in fee, with a power of disposal reserved to the granter, a claim for terce by the widow of the nominal fiar was refused, upon grounds which implied that the widow of the liferenter would have been entitled to claim terce, her husband being regarded as the beneficial proprietor.[6] A different decision would doubtless be given in the case of a party vested by a testamentary disposition or grant with a liferent right, coupled with a general power of disposal, as it has been decided that a right of this nature does not amount to a beneficial fee.[7] Estate, the title of which is taken by the proprietor to himself in liferent and to his children *nascituri* in fee, is subject to terce and so also is property settled *intuitu mortis*, under reservation of a power to alter. It appears to be still an open question whether terce can be claimed in respect of heritable property vested by infeftment in trustees, but in which the beneficiary proprietor was not himself infeft. The opinions of Lord Fraser and Professor More are adverse to the claim of the widow in this case;[8] and it

[1] See Stair, 2, 6, 17; Ersk. 2, 9, 48; Dirleton and Stewart, 430.

[2] Bell's Pr. § 1598, and see note by Mr. Shaw in Com., 6th ed. p. 807.

[3] Ersk. 2, 9, 48; *Littlejohn* v. *Weir*, 1695, 4 Br. Sup. 234; *Mackenzie*, 1628, M. 15,838.

[4] *Belshier* v. *Moffat*, 1779, M. 15,863.

[5] *Bartlett* v. *Buchanan*, 21 Feb. 1811, F.C.

[6] *Cumming* v. *Lord Advocate*, 1756, M. 15,854, 5 Br. Sup. 843.

[7] *Morris* v. *Tennant*, H. of L., 27 Jur. 546; *re Weddell*, 3 Feb. 1849, Excheq. Rep.; *Alves* v. *Alves*, 8 Mar. 1861, 23 D. 712. It would appear from these decisions that, in the case of a lapse, the property would not pass to the heirs-at-law of the party who had the liferent with a power of disposal.

[8] Fraser, 2d ed., p. 1092; More's Notes on Stair, p. 219.

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appears that a title of this kind is distinguishable in principle from that of a title in the trustee flowing from the beneficiary proprietor. In the latter case the proprietor is in form, as well as in substance, a proprietor infeft in the estate,—a proposition which cannot be predicated of a beneficiary under a trust-disposition flowing from another party.

Terce due from lands sold or adjudged, if infeftment not taken by purchaser.

164. The rule that the husband's infeftment is the measure of the terce leads to this consequence also, that estate alienated by the husband by deed *inter vivos* to a singular successor, whether on a gratuitous or an onerous title, remains subject to his widow's terce, unless infeftment is taken by the purchaser in the granter's lifetime.[1] By parity of reason, an adjudger, uninfeft in the lifetime of the debtor, takes the estate subject to the claims of the widow,[2] even though he may have proceeded to charge the superior to give him an entry.[3] Such cases are not likely to occur in practice, since adjudgers have now the means of taking immediate infeftment under the provisions of the Conveyancing Statutes.

Objection to ancestor's title not a good defence.

165. By an equitable extension of the rule, the widow is entitled to terce from the husband's estate in which he was infeft, notwithstanding objections to the title sufficient to support a reduction, provided the right was not challenged during the subsistence of the marriage. The reason is, that the heir is not entitled to take advantage of objections which his ancestor might have obviated had he been required to do so.[4] And it was held that a widow was entitled to claim terce out of estate of which her husband's father had bound himself to grant an infeftment, although the obligation was not implemented in the lifetime of the son.[5]

Terce not due from estates held personal.

166. Terce is not due from leases, nor from heritable estate possessed on a personal title, nor from teinds, unless included in an infeftment in lands,[6] or standing on a separate title feudalised.[7]

Not due from mansion-house, superiorities, reversions, patronages, or minerals.

167. Although, as formerly mentioned, the mansion-house and appendages are excepted from the feudal subjects liable to terce,[8] it is the general opinion of the writers who have treated of this

[1] *Carlyle* v. *Carlyle's Crs.*, 1725, M. 15 851 ; *Campbell* v. *Campbell*, 1776, 5 Br. Sup. 627 ; *Boyd* v. *Hamilton*, 1805, M. 15,874; *M'Culloch* v. *Maitland*, 1788, M. 15,866; *Carruthers* v. *Johnston*, 1706, M. 15,846.

[2] *Hamilton* v. *Wood*, 1770, M. 15,858.

[3] *Carlyle* v. *Carlyle's Crs.*, 1725, M. 15,851, overruling *Hunter* v. *Douglas*, 1715, M. 15,850.

[4] *Rose* v. *Fraser*, 1790, M. "Terce," App. No. 1 ; and see a similar decision in reference to Courtesy ; *Hamilton* v. *Boswell*, 1716, M. 3117.

[5] *Annandale* v. *Scott*, 1711, M. 15,848 ; Stair, 2, 6, 16, and authorities there cited ; Ersk. 2, 9, 46. But see *Carruthers* v. *Johnston*, 1706, M. 15,846.

[6] *Moncrieff* v. *Tenants of Newton*, 1667, M. 15,844.

[7] *Arbuthnott* v. *Arbuthnott's Trs.*, 1805, Hume, 294; *Dunfermline* v. *Dunfermline*, 1628, M. 15,840 ; Stair, 2, 6, 16 ; Ersk. 2, 9, 48.

[8] *Supra*, § 162.

subject, that a widow is entitled to a second mansion or messuage, if there is one,[1] or at least to a third of its annual value.[2] Houses let by the proprietor are subject to terce, but it is not clear that this rule would apply to a mansion-house.[3] Superiorities are not subject to terce either in relation to feu-duties or casualties.[4] Rights of reversion, of which the case of wadsets has already been mentioned, are excepted from terce on the ground that they yield no annual profit.[5] The same principle has been considered applicable to patronages.[6] Coal and other minerals, as being the consumption of the substance of the estate, and not proper revenue, are not subject to the widow's claims. But though a widow would not be entitled to work minerals herself, or to claim a share of the profits, it would seem that, as a liferenter, she is entitled to have from the workings a supply for her own consumption.[7] Terce is diminished by heritable securities on which infeftment has followed ;[8] and, where such a security is constituted by an *ex facie* absolute disposition, terce is only due from the reversion, after deducting the value of the debts intended to be secured.[9]

Tercer, without service, has the right of apparency.

168. Although service is necessary to give a vested right to terce, so that the profits may be assigned or transmitted to executors,[10] the widow, without service, has the substantial rights of an heir possessing on apparency. She is entitled to receive the fruits of the subjects ; her discharges to tenants will be valid to the extent of her interest, and no action can be maintained against her representatives for repetition in the event of her dying without having completed a title.[11] Before service a tercer has no active title.[12] The title acquired by service draws back to the date of the

[1] Ersk. 2, 9, 48 ; Bell's Com. 7th ed. 56.

[2] The doctrine here stated was considered doubtful by the judges who decided the case of *Mead* v. *Swinton*, 1796, M. 15,873.

[3] Bell's Pr. § 1598 ; *Logan* v. *Galbraith*, 1665, M. 15,482. In *Menzies* v. *Menzies* it was held that the value of shootings must be allowed to the widow in a locality ; 10 July 1855, 17 D. 1090.

[4] Stair, 2, 6, 16 ; Ersk. 2, 9, 49 ; *Lamington* v. *Lamington*, 1628, M. 8240 ; *Nisbet* v. *Nisbet*, 24 Feb. 1835, 13 Sh. 517. In the last case the greater part of the estate consisted of feu-duties, but the Court refused to admit an exception to the rule already established by uncontradicted precedents.

[5] Stair, 2, 6, 16 ; Ersk. 2, 9, 49 ; *Macdougall* v. *Macdougall's Crs.*, 1801, M. "Terce," App. No. 2.

[6] Stair and Ersk. *ut supra* ; Bell's Com., 7th ed. 57.

[7] 1 Bell's Com. 58, 7th ed. 57 ; *Lamington* v. *Lamington*, 1682, M. 8240 ; *Belshier* v. *Moffat*, 1779, M. 15,863 ; 1 Fraser, 621.

[8] 1 Bell, Com. 58 ; *Campbell* v. *Campbell*, 1776, 5 Br. Sup. 627.

[9] Bell, Com., *ut supra* ; *Bartlett* v. *Buchanan*, 21 Feb. 1811, F.C.

[10] *M'Leish* v. *Rennie*, 21 Feb. 1826, 4 Sh. 485 (N.E. 491) ; Stair, 2, 6, 15 ; Ersk. 2, 9, 55.

[11] *Fea* v. *Traill*, 1731, M. 16,115 ; *M'Leish* v. *Rennie*, *supra*, per Lord Gillies ; 1 Fraser, 627.

[12] Stair, 2, 6, 15 ; Ersk. 2, 9, 50 ; *Yeoman* v. *Oliphant*, 1666, M. 15,843 ; *Barclay* v. *Scott*, 1675, M. 15,844.

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opening of the succession, and enables the tercer to sue tenants for arrears.[1] But it is a good defence that these have already been paid *bona fide* to the heir,[2] against whom recourse cannot be lost, except by the long negative prescription.[3]

Rights of tercer where estate sold by the heir.

169. A widow is entitled to compensation from the heir for her share of the value of lands sold by him before fixing her terce lands;[4] and in the event of a sale after the completion of her right, she seems to be entitled to require, either that a third part of the price should be invested in such a manner as to secure her liferent right,[5] or to require that her right be made a burden on the purchaser's title, which it will be in any event, independently of convention, unless she joins in the conveyance.[6] A widow suing the heir for arrears of terce is entitled to the benefit of the increment in the rental or value of the property during the period for which she claims,[7] but expenditure by the heir in paying off debt does not operate in her favour.[8]

Responsibility of tercer for waste under Scottish statutes.

170. By two Acts of the Scottish Parliament,[9] liferenters and conjunct fiars were required to find caution that they should not waste or destroy the subject liferented, but deliver it at the termination of the liferent in the same situation as when received, subject to the usual tear and wear. In case of refusal, liferenters may be charged personally to find caution, under pain of the profits being confiscated to the King's use. These statutes have been held to apply to the legal liferents; and, in a comparatively recent case,[10] it was found to be incompetent to proceed against a tercer by way of an action of damages, or otherwise than under the statutes, for waste or mislabouring the lands during her possession. Nor can a tercer be compelled to find caution, except upon grounds which would have warranted an interdict at common law,—that is, upon the allegation of injury already done, and the apprehension of further injury.[11]

Lesser terce. Mode of computation.

171. Where a proprietor dies leaving a widow, and terce is already payable out of the estate to the widow of a former proprietor, the second or lesser terce is restricted to a third of the pro-

[1] Stair, 2, 6, 15; Ersk. 2, 9, 50; *Veitch*, 1632, M. 16,087; *A* v. *B*, 1632, M. 15,842; *Fea* v. *Traill*, *supra*.

[2] Bankton, 2, 6, 15; *Wamphray*, 1669, 2 Br. Sup. 440; *Dunfermline* v. *Dunfermline*, 1628, M. 14,707, 15,840.

[3] Stair, 2, 6, 15; Ersk. 2, 9, 50; *Crighton* v. *Hamilton*, 1532, M. 15,835; *Semple* v. *Crawford*, 1625, M. 15,837; *Easthouses* v. *Hepburn*, 1627, M. 15,838; *M'Leish* v. *Rennie*, *supra*.

[4] *Bell* v. *Halliday*, 8 Dec. 1825, 4 Sh. 285, N.E. 289.

[5] 1 Bell, Com. 59.

[6] *Boyd* v. *Hamilton*, 1805, M. 15,874. See also *Bartlett* v. *Buchanan*, 21 Feb. 1811, F.C.

[7] Stair, 2, 6, 15.

[8] *Balmaghie* v. *Balmaghie*, 1633, M. 15,842.

[9] 1491, cap. 25, and 1535, cap. 15; see Ersk. 2, 9, 59.

[10] *Bell* v. *Bell*, 7 Dec. 1827, 6 Sh. 221.

[11] *Ralston* v. *Leitch*, 1803, Hume, 293.

perty beneficially possessed by the late proprietor. In other words, the value of the first terce is first deducted, and the lesser terce is allowed out of the remainder. The liferent right of the second tercer is enlarged to a third of the entire estate, in the event of her survivance of the first tercer. There is no limit to the number of legal liferents which may accrue out of the same estate, but each right, as it falls due, amounts to no more than a third of the free succession.[1]

SECTION IV.

Of Courtesy.

Nature of the right and reason for its existence.

172. Courtesy is a legal liferent accruing to the surviving husband of a proprietrix of heritable estate in Scotland. It consists of a liferent of all the heritable estate, not being conquest, in which the wife was infeft in fee at the time of her death.[2] Instead of entering into the inquiries which have engaged the attention of authors respecting the origin of courtesy, we shall merely observe that the law is the natural result of the opinions of society, which are shown to be favourable to the principle of this provision by two considerations :—First, that courtesy in practice is never excluded by convention, while terce frequently is; secondly, that although no such right has been acknowledged by the law in reference to moveable estate, it is customary, in settling the property of a married lady, to give the husband a liferent of her moveable as well as of her heritable estate. A sufficient reason for the law is, that it would not be reasonable that a father should be deprived of the status and emoluments of a proprietor by his son. That is what is meant by the explanation that courtesy is simply an extension of the *jus mariti*.[3] It is not so strictly speaking, because the right of courtesy is a proper liferent estate, its continuance is dependent upon certain conditions, and the right itself is not co-extensive with that of the *jus mariti*, but is confined to heritage.

Courtesy only due to the father of an heir.

173. To entitle a husband to courtesy, it is essential that a viable child shall have been born of the marriage,[4] who either is at the

[1] Stair 2, 6, 16; Ersk. 2, 9, 47; 1 Fraser, 622, and authorities there cited.

[2] Stair, 2, 6, 19; Ersk. 2, 9, 52; 1 Bankton, 663. The right is by the older authors called the courtesy of Scotland in contradistinction to the analogous, but not identical, rights existing under the same name in England and elsewhere.

[3] Ersk. 2, 9, 52. Prof. Bell points out, 1 Com., 7th ed. 59 the distinction between the courtesy as an *estate in liferent*, and the *jus mariti*, which is merely a right to the *proceeds of the estate*, after these have fallen due and passed into the condition of personalty.

[4] Stair, 2, 6, 19, 2d par.; Ersk. 2, 9, 53; 1 Bell, Com. 60; *Stewart* v. *Irvine*, 1632, M. 3112. The test of viability, in this as in other cases relative to civil rights, is, that the child has been heard to cry; *Roberton* v. *Roberton*, 22d Jan. 1833, 11 Sh. 297.

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moment of birth, or becomes afterwards, the heir-presumptive to the estate.[1] This rule is sometimes expressed by saying that courtesy is given, not to the husband of an heiress, but to the father of an heir. A person who marries an heiress, having a son by a former marriage, will therefore not be entitled to courtesy,[2] unless the son of the first marriage predeceases his mother, or dies without having been served heir, survived by a child of the second marriage.[3] Where the heiress is predeceased by all her children of both marriages, the last survivor being of the second marriage, it would seem that courtesy is due to the surviving husband, because he was at one time in the position of being the father of the heir-presumptive, and it is not necessary to the constitution of the right of courtesy that the heir should actually inherit.

From what subjects courtesy is due.

174. While, as already stated, the courtesy extends over all heritable estate (excepting conquest) in which the proprietrix was infeft in fee, the surviving husband has the benefit of her possession upon a defective title; and therefore, if the title is reduced after the wife's death upon defects which might have been rectified in her lifetime, the husband will still be entitled to his courtesy.[4] Courtesy is due from property held by burgage tenure [5] and from feu-duties, but apparently it is not due from casualties of superiority.[6]

From what subjects courtesy is not due.

175. Courtesy is not due from conquest heritage, or estate which the wife acquired by singular title[7] but only from estate which she inherited as heir of line or provision,[8] or which she acquired from her ancestor in his lifetime *præceptione hæreditatis*.[9] The origin of this exception is not well ascertained, and no good reason can be assigned for it. Courtesy, as well as terce, attaches to entailed property if it is not expressly debarred by the entail.

Vesting of courtesy.

176. Courtesy vests *ipso jure*, and does not require any process

[1] Stair and Ersk. *ut supra*. It was held that the existence of a child legitimated *per subsequens matrimonium* gave the widow a right to terce notwithstanding the dissolution of the marriage within a year and day; *Crawford's Trs.* v. *Hart*, 1802, M. 12,698. This ruling, while no longer important as regards the right of terce, is an authority for giving the husband his courtesy if the case should ever occur of a proprietrix of landed estate bringing a child to her husband before marriage.

[2] Ersk. 2, 9, 53; *Darleith* v. *Campbell*, 1702, M. 3113; compare *Spence* v. *Durie*, 1610, M. 3111.

[3] More's Notes, 219.

[4] This proposition rests upon a decision in relation to terce; *Hamilton* v. *Boswell*, 1716, M. 3117; Robertson, 192.

[5] Craig, 2, 22, 43; Stair, 2, 6, 19; Ersk. 2, 9, 54; Bell, Pr. § 1606.

[6] Casualties are due to the party infeft as superior, and to him only. The decision in the analogous case of heirs-portioners appears to be founded on this principle. See the case *M'Neight* v. *Lockhart*, 30 Nov. 1843, 6 D. 128.

[7] Stair, 2, 6, 19, *in fin.*; Ersk. 2, 9, 54; *Hodge* v. *Fraser*, 1740, M. 3119, Elch. *voce* "Husband and Wife," No. 13; *Lawson* v. *Gilmour*, 1709, M. 3114; *Paterson* v. *Ord*, 1781, M. 3121.

[8] Stair and Ersk., *ut supra*.

[9] Stair, 2, 6, 19; *Primrose* v. *Crawford*, 1771, M. "Courtesy," App. No. 1; *Knight* v. *Robertson*, 1798, M. 8815.

to clothe the surviving husband with an active title, or to enable him to assign or transmit to executors the rents accruing in his lifetime.[1] During its subsistence the heir is not bound to enter with the superior, and is not liable to the casualty of non-entry.[2] By the Married Women's Property Act, 1881, section 2, it is enacted, "Where a marriage is contracted after the passing of this Act, the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband." To the writer this section does not seem to affect courtesy, notwithstanding that this right is sometimes treated as an extension of the *jus mariti*.

Rights incident to the possession of courtesy.

177. Courtesy carried with it the usual rights and privileges pertaining to the estate of a liferenter,[3] including the right to vote for a Member of Parliament.[4] The liferenter is liable to find caution in terms of the Acts 1491, cap. 25, and 1535, cap. 15, in case of reasonable apprehension of injury to the estate by waste or dilapidation actually commenced.[5] The courtesy is liable to be diminished not only by the annual charge of heritable debts and real burdens, but also by the interest (not the principal) of *personal debts*,[6] to the same extent to which the estate would be liable for such interest if it were in his possession as absolute proprietor. The liability is limited to the amount of the rents, and there is relief against the wife's executors, and also against her heir of conquest or successor in estate not subject to the courtesy.[7] Courtesy does not subject the husband to liability for the wife's debts or obligations, except to the limited extent stated.

[1] Stair, 2, 6, 19; Ersk. 2, 9, 52.
[2] Craig, 2, 22, 42.
[3] Ersk. 2, 9, 54.
[4] *Knight* v. *Robinson*, 1786, M. 8815.
[5] Ersk. 2, 9, 59; *supra*, § 170.
[6] See Ersk. 2, 9, 55; and see 1 Bell Com. 62; *Menteith* v. *Next of Kin*, 1717, M. 3117.
[7] *Menteith*, *ut supra*.

CHAPTER V.

VESTING OF THE HERITABLE SUCCESSION, AND TITLE OF THE HEIR.

1. Possession on Apparency.
2. Service of Heirs-at-Law and Vesting under the Statute.
3. Vesting of Terce and Courtesy in Right and in Title.

SECTION I.

Possession on Apparency.[1]

178. Since the passing of the Conveyancing Act, 1874, which vested the heritable estate *in right* in the heir, the subject of this section has become less important. But as service is still necessary to give the heir a *title* to lands and heritages in general, it may be convenient to consider what are the rights of an heritable nature which were not taken up by service under the feudal system, and which, of course, are still vested in the heir in right and title without that formality.

Apparent heir distinguished from heir-presumptive.

179. The person who, on the opening of a succession by death, stands in the relation of nearest heir of the deceased, is denominated an apparent heir.[2] Prior to the exercise of his privilege of obtaining himself served heir (which he may do at any time), the heir is said to have the title of apparency, which, as will be seen, is a good title of possession, though it does not vest the estate. An eldest son is sometimes termed heir-apparent in his father's lifetime, because his right of succession cannot be defeated by the birth of a nearer heir, but in contemplation of law he is then only an heir-presumptive.[3]

Title of apparency.

180. I. Vested Rights of an Apparent Heir.—An heir-apparent acquires, by survivance of his ancestor, a vested right to certain descriptions of subjects, and as to the rest, he has a right of possession of the nature of a usufructuary interest.

181. Titles of honour and hereditary offices are said to vest in

[1] It is to be observed that although, for convenience, the subject of the rights of the heir-apparent is treated in connection with intestate succession, the doctrines here explained are equally applicable to the relations of law arising in the case of possession on apparency by an heir of provision.

[2] Ersk. 3, 8, 54; 1 Bell's Com., 7th ed. 99; Bell's Pr. § 1677.

[3] See, for example, the use of the word heir-apparent in the Entail Amendment Act, 11 and 12 Vict., cap. 36, § 52.

the apparent heir *jure sanguinis*. They require no service, the right being constituted by survivance of the person last seized.[1] The tenant's right under a lease or other title of possession vests by apparency without service, and is transmitted to the heir-at-law of the apparent heir.[2] By the Act for the Registration of Long Leases (20 and 21 Vict., cap. 26) provision is made for the completion of titles in the persons of heirs to the new description of leasehold estate created by the Act, by a form of entry similar to that which obtains in relation to feudal subjects. Heirs who have been served by general or special service may obtain infeftment by recording a notarial instrument (sect. 8), and the same object may be accomplished without service, by means of a writ of acknowledgment from the proprietor infeft in the subjects, recorded in the Register of Sasines. The machinery provided by the Act is necessary for the purpose of preserving a record of the title to long leases, and securing the rights of purchasers. It is not said to be requisite for the purpose of vesting the right in the heir-at-law; and in the absence of express provision on the subject, it may be held that the heir's right vested without service. As examples of rights which vested by possession on the title of apparent heir may be mentioned rights deemed heritable, as having *tractus futuri temporis—e.g.*, usufructuary interests in personal property, pensions, and the like.[3] Heirship moveables vested in the apparent heir by possession; but if not claimed in his lifetime they passed with the estate to the next heir of the person last seized.[4] Corporeal moveables, such as books, furniture, or pictures, entailed or otherwise settled upon heirs in heritage, and so made heritable by destination, vest by possession without service.[5]

What subjects vest by apparency without service.

Tenant's right under long leases.

182. Finally, apparency and possession, without any other title, vest the right to the rents and proceeds of the heritable estate.[6] An heir possessing on apparency, therefore, transmits to his executors his right to arrears of rents, interest on heritable debts and on the price of land sold, and other unrecovered proceeds.[7]

Rents.

183. Udal property in Orkney and Shetland vests in the heir by survivance without service.[8]

Udal property.

[1] Ersk. 3, 8, 77; Bell's Pr. § 1679; *Cockburn* v. *Langton's Crs.*, 1747, M. 150.

[2] Ersk. *ut supra*; *Rule* v. *Hume*, 1635, M. 14,374; *Boyd* v. *Sinclair*, 1671, M. 14,375; *Hume* v. *Johnston*, 1675, M. 14,375; *Campbell* v. *Cunninghame*, 1739, M. 14,375; *Murdoch* v. *Murdoch's Trs.*, 27 Jan. 1863, 1 Macph. 330. In virtue of his title of apparency, the tacksman may insist in a removing against possessors without a title; *Scott* v. *Baird*, 1754, M. 14,376, 5 Br. Sup. 814.

[3] Ersk. *ut supra*; Bell's Pr. § 1681. As to reversions see Stair, 3, 5, 6, and Ersk. 3, 8, 77.

[4] Ersk. 3, 8, 77; Bell's Pr. § 1909.

[5] *Veitch* v. *Young*, 1808, M. "Service and Confirmation," App. No. 4.

[6] Ersk. 3, 8, 58; Bell's Pr. § 1682; *Weir* v. *Drummond*, 1664, M. 5244.

[7] *Hamilton* v. *Hamilton*, 1767, 2 Pat. 137, rev. M. 5253, and cases cited *infra*, § 190 *et seq.*

[8] This is not distinctly laid down by

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Estate to which the ancestor had a beneficial title.

184. Heritable rights accruing by intestacy to the heirs-at-law of beneficiaries under unexecuted marriage-contracts and trust-settlements were required to be vested in right by general service, notwithstanding that the feudal title was in trustees.[1] And so where a beneficiary acquired a vested interest by survivance of the period of vesting, and afterwards died without having received a conveyance from the trustees. His heirs in that case did not take the estate in the character of beneficiaries, but in that of heirs-at-law of the party who had the vested right; and that right could only be taken out of the *hæreditas jacens* of the deceased by service. The case of *Buchanan* v. *Angus*[2] settled the point, that the right of a *substitute* under an unexecuted trust-deed lapsed by reason of his death without connecting himself with the institute by a general service; and that decision necessarily ruled the point under consideration.

Limitations of the right of apparency.

185. Except as to the special subjects above mentioned, apparency, even when coupled with possession, did not vest the property in right in the heir entitled to the succession. In order to the acquisition of a vested and transmissible interest in feudal estate, the title by service or entry with the superior was necessary. In the event of the death of the heir without completing a title, the estate remained *in hæreditate jacente* of the ancestor, and the right to take up the estate by service passed to the next heir, who was not necessarily the same person as the heir-at-law of the apparent heir.

Division of the subject.

186. II. Apparency as a Title to Feudal Subjects.—Besides the substantial right which an apparent heir acquires under the Statute of 1874 by survivance of the ancestor, there are certain active rights which pertained to him under the feudal law, and which the Conveyancing Act apparently leaves untouched. The rights of an apparent heir in relation to feudal estate are (1) the right of deliberation; (2) the right of possession, including perception of the fruits; and (3) the right conferred by the Scottish Statute, of bringing the ancestor's estate to judicial sale for payment of debts. These may be considered in their order.[3]

previous writers; but it is assumed as customary law in the cases upon titles to this description of property. See *Beatton* v. *Gaudie*, 2 Feb. 1832, 10 Sh. 286.

[1] *Gordon's Trs.* v. *Harper*, 4 Dec. 1821, F.C., and 1 Sh. 185, N.E. 175; *Broughton* v. *Fraser*, 3 March 1832, 10 Sh. 418; *Ogilvy* v. *Ogilvy*, 16 Dec. 1817, F.C.

[2] *Buchanan* v. *Angus*, 15 May 1862, 4 Macq. 374, affirming, *on this point*, 22 D. 979.

[3] In the case of a competition for the character of heir, the right of intermediate possession is regulated by the Court on equitable considerations. A preference is given to a person claiming as heir of the person last seized in a question with an heir whose claim involves a denial of the right of the late proprietor. Some weight is given to actual possession. In cases

Period of deliberation; how computed.

187. (1.) In order that the heir might duly consider the expediency of accepting the succession with the burden of responsibility for the ancestor's debts, he was allowed an interval of one year, computed from the ancestor's death,[1] termed *annus deliberandi*, during which he was not bound to enter or to respond in any action directed against him in the character of heir,[2] except in relation to the widow's provisions.[3] If the apparent heir should die in the course of the year, the next heir had a full year from the time that his right emerged.[4] The responsibility of heirs being now limited to the value of the estate, this right has ceased to have any practical value, and it is now provided by statute that actions of constitution and adjudication against apparent heirs, whether in respect of the ancestor's or the heir's debt or obligation, may be insisted in after the lapse of six months from the date of the defender becoming apparent heir.[5] It was understood that actions of adjudication and judicial sale instituted against the ancestor might proceed against the heir without waiting the expiration of the term of deliberation, to the effect of making the estate liable for the ancestor's debts.[6] Actions directed against the heir himself may apparently be executed, but cannot be brought into Court, before the expiration of the semestrial period.[7]

Renunciation of the right of deliberation.

188. The heir may tacitly renounce his right of deliberation by taking an entry [8] or by assuming possession during the six months, in which case he incurs the passive liability appropriate to his title of possession.[9]

Exhibition *ad deliberandum*.

189. As an accessory to his right of deliberation, the apparent heir may bring an action of exhibition *ad deliberandum* against custodiers of the title-deeds, securities, books, or documents of debt affecting the estate of the ancestor or the person of his representa-

where the claims appear to be in *pari casu* as far as regards the right to interim possession, the Court will sequestrate the estate, but this is a course which the Court is always reluctant to adopt. See the cases of *Campbell* v. *Campbell* (Breadalbane Succession), 1 M. 991, 4 Macq. 711; *Earl of Wemyss* v. *Campbell*, 20 Jan. 1864, 2 M. 461; and *Thoms* v. *Thoms*, 27 March 1865, 3 M. 776.

[1] Ersk. 3, 8, 54; Bell, Pr. § 1685. The period is computed from the date of birth in the case of a posthumous heir; *Summers* v. *Simson*, 1757, M. 6882. The period is not extended by reason of the absence of the heir from the country at the time the succession opens; *Henderson* v. *Campbell*, 1783, M. 5292.

[2] Ersk. 3, 8, 55; *Stewart* v. *Anderson*, 1749, M. 6881.

[3] *Pitcairn* v. *Wallwood*, 1702, M. 6873.

[4] *Stevenson* v. *Tweedie*, 1649, 1 Br. Sup. 422.

[5] Titles to Land Consolidation Act, 1868, § 61.

[6] *Campbell*, 1708, M. 6877.

[7] *Summers* v. *Simson*, 1757, M. 6882; *Mackintosh* v. *Macqueen*, 9 July 1829, 7 Sh. 882.

[8] *Edgar* v. *Halliday*, 1624, 1 Br. Sup. 17.

[9] *Hamilton* v. *Bonar*, 1677, M. 6873; *Ferguson* v. *M'Gachen*, 11 March 1829, 7 Sh. 580.

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tive.[1] The action may be raised at any time.[2] The deeds required must be specified.[3] But, unless in special circumstances, an apparent heir could not maintain an action for delivery of the title-deeds of the ancestor's estate prior to the alteration of the law effected by the Conveyancing Act, 1874.[4] In the case of deeds affecting particular estates of the ancestor, the defender's infeftment on an irredeemable conveyance from the pursuer's ancestor constitutes an exclusive title in virtue of which he may withhold exhibition of the documents called for.[5] Infeftment on a decree of adjudication does not constitute an exclusive title until the legal has expired, and decree of declarator has been pronounced,[6] nor is the heir's right to demand exhibition excluded by a trust-deed or other limited title derived from the ancestor.[7]

Active rights of an apparent heir.

190. (2.) An apparent heir may continue his ancestor's possession without a title,[8] and has all the active rights necessary to enable him to maintain his possession, except that he cannot remove tenants holding on leases from the deceased proprietor,[9] but only those deriving right from himself.[10] He has a title to challenge deeds of the ancestor as executed on deathbed;[11] and it would appear that an heir-at-law unentered has also a title to institute declaratory actions[12] as well as reductions of conveyances adverse to his right upon intrinsic nullities or informalities,[13] in which respect he is more favoured than an heir of provision, who must obtain himself served in the proper character before he can be admitted to sue in that character.[14]

[1] *Maxwell* v. *Maxwell*, 1675, M. 4009; *Buchanan* v. *M. of Montrose*, 1705, M. 4010; *Crawford* v. *Crawford*, 1714, M. 3986; *Spark* v. *Barclay*, 1715, M. 3988; *Adair* v. *Adair*, 1787, M. 3992.

[2] *Nisbet* v. *Whitelaw*, 1625, M. 3982; *Macfarlane* v. *Buchanan*, 1779, M. 3991.

[3] *Heron* v. *Heron*, 1756, M. 4019.

[4] *Smith* v. *Jackson*, 1871, 10 M. 211.

[5] *D. of Hamilton* v. *Douglas*, 1761, M. 3966; *Cathcart* v. *E. of Cassillis*, 1795, M. 3993, 31 May 1825, 1 W. & S. 240.

[6] *Liddell* v. *Wilson*, 19 Dec. 1855, 18 D. 274; *Douglas* v. *Holmes*, 19 July 1854, 16 D. 1116.

[7] *Macfarlane* v. *Buchanan*, 1779, M. 3991. As to the right of exhibition competent to an heir or claimant of a title of honour, see *Lady M. L. Crauford* v. *Campbell*, 2 Sh. 737, N.E. 615; 26 May 1826, 2 W. & S. 440.

[8] Ersk. 3, 8, 58; *Heron* v. *M'Kie*, 1741, M. 5239; *Ogilvy* v. *Reid*, 1727, M. 5242. But Bell expresses the opinion that a disponee under a personal title might in certain circumstances be entitled to demand sequestration of the estate; 1 Com. 7th ed. 94.

[9] *Paton* v. *Mackintosh*, 1757, M. 5273; *Sutherland* v. *Graham*, 1757, M. 5276; *Campbell* v. *M'Kellor*, 1808, M. "Removing," App. No. 5; *Johnstone* v. *Martin*, 3 March 1816, F.C.; *Scott* v. *Fisher*, 2 Feb. 1832, 10 Sh. 284. See, as to using diligence upon a decree obtained by the defunct, *Mackenzie* v. *Gillanders*, 8 Dec. 1853, 16 D. 158.

[10] 2 Hunter on Landlord and Tenant, 3d. ed. p. 3.

[11] *Graham* v. *Graham*, 1779, M. 3186; Hailes, 823.

[12] *M'Andrew* v. *Reid*, 1868, 6 M. 1063, and cases there cited.

[13] *Rutherford* v. *Nisbet's Trs.* 12 Nov. 1830, 9 Sh. 3; *Cochrane* v. *Ramsay* (Murdieston), 11 March 1828, 6 Sh. 751.

[14] Bell, Pr. § 1683; *Edmonston* v. *Edmonston*, 1637, M. 16,089. But see *Graham* v. *Graham*, *supra*.

Perception of rents.

191. The heir is also entitled, as we have seen, to uplift the rents and receive the fruits of his ancestor's estate which he possesses on apparency. And it would seem that the husband of an heiress-apparent has the right of possession irrespective of her consent, and that, in virtue of his right of administration, he may bring an action of maills and duties against tenants[1] though he cannot compel his wife to make up a title.[2] The right to the annual income of the estate is in the strictest sense a vested interest.[3] The heir, or his executor after his death, is therefore entitled to sue for arrears of rent, and has the capacity of granting discharges for them upon receipt of payment.[4] The apparent heir has also right to cut the wood on the estate; but the right itself, and the benefit of any current contracts for *silvæ cæduæ*, are personal, and do not pass to his executors.[5]

Apparent heir's right to institute judicial sale.

192. (3.) The right of an apparent heir to bring his ancestor's estate to a judicial sale depends on the provisions of the Scottish Statute (1695, cap. 24), and it ceases to be competent after entry by special service.[6] The right is not lost by intromission with the estate in virtue of the title of apparency,[7] nor by service as heir in general *cum beneficio inventarii*,[8] or with a specification.[9] A deed of entail not made real by infeftment does not bar a sale by the heir for the entailer's debts;[10] but, according to Professor Bell, an entail completed by infeftment cannot thus be defeated by the heir at his own hand,[11] but the creditors may take proceedings against the estate at their own instance.[12] The instance of the apparent heir is preferable to that of creditors,[13] and the creditors cannot interfere to prevent the heir from exercising his privilege.[14] On the

[1] Per Lord President Hope in *Ferguson* v. *Cowan*, 3 June 1819, reported in a note to 20 D. 662, 663.

[2] *Ibid.* The case is also reported in Hume, p. 222.

[3] 1 Bell, Com. 7th ed. 94; Ersk. 3, 8, 58; Kames' Law Tracts, No. 5 (p. 173).

[4] *Hamilton* v. *Hamilton*, 8 April 1767, 2 Pat. 137, reversing M. 5253; *Stewart Nicolson* v. *Houston*, 1756, M. 5249; *Joass* v. *Lord Banff*, 1765, 5 Br. Sup. 912.

[5] 1 Bell, Com. 95, citing *Taylor* v. *Veitch*, 24 June 1796, Sir Ilay Campbell's Sess. Pap.

[6] 2 Bell, Com. 7th ed. 241, citing cases noted *infra*. See the Statute 1695, cap. 24.

[7] *Blair* v. *Stewart*, 1733, M. 5247.

[8] *Blair, petr.*, 1751, M. 5353, and cases of *M'Dowall* v. *Kelton's Crs.*, 1742, and *Rutherford*, 1748, cited there, and in 2 Bell's Com. 241.

[9] Service with specification was introduced by 10 and 11 Vict., cap. 47, § 25.

[10] *Mitchell* v. *Tarbutt*, 4 Feb. 1809, F.C.

[11] 2 Bell, Com. 242.

[12] By Statute 1681, cap. 17, the Court of Session is empowered, "upon process at the instance of any creditor having a real right," to value, sell, and divide the proceeds of the sale of estates whereof the heritor is notoriously bankrupt. But creditors are not entitled like apparent heirs to bring the estate to sale irrespective of insolvency, and if the heir declines to sell they can only attach the estate by adjudication.

[13] *Belshier's Crs.* v. *His Apparent Heir*, 1776, 5 Br. Sup. 561.

[14] *Hamilton's Crs.*, 1749, M. 13,323.

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death of one apparent heir the action may be insisted in by the next heir, if he remain unentered.[1]

Equivalent procedure after heir is entered.

193. After service and infeftment it was held that, in place of the statutory procedure, the heir might bring an action of valuation, concluding that, on payment of the value, he should be free of the representation. If, however, the creditors objected, they might insist on having the estate distributed under an action of ranking and sale at their instance.[2] Professor Bell lays down that an apparent heir may dispose of the estate by a voluntary sale, if he is not interdicted by creditors;[3] it would be necessary that he should complete his title in order to be able to give a valid title to a purchaser.

Judicial sale does not infer passive title.

194. A process of sale by an apparent heir does not infer a passive title;[4] and in a case where an heir had renounced the succession in the proceedings in a prior action of constitution instituted against him, it was held that he had not thereby disqualified himself from instituting an action of judicial sale under the statute.[5]

Passive liability of apparent heirs.

195. Possession on apparency renders the heir universally liable for the debts of his ancestor, as in the case of possession on an unlimited title.[6] The estate also is liable for the ancestor's obligations, and may be adjudged as *in hæreditate jacente* by the ancestor's creditors,[7] who, of course, have a preferential right in a question with the creditors of the apparent heir.[8] The reversionary estate, however, may be attached for the debts of the apparent heir, provided the decree is obtained in his lifetime;[9] but if the heir died unentered, before decree of adjudication was obtained, the estate passed to the next heir of the person last entered, who was under no obligation to represent the apparent heir.[10] This consequence of the feudal law of succession was mitigated by the provisions of the Scottish Statute 1695, cap. 24, by which a person passing over an apparent heir, who was three years in possession,

[1] Anonymous case, reported by Elchies, "Ranking and Sale," No. 22.

[2] 2 Bell, Com. 7th ed. 241, citing case of *Kingsgrange;* Ersk. 3, 8, 69.

[3] Bell, Com., *ut supra.*

[4] Stat. 1695, c. 24, 2 Bell, Com. 242.

[5] *Smith* v. *Harris*, 3 Mar. 1854, 16 D. 727. See the exposition of the subject of judicial sale for behoof of creditors by Prof. Bell, in 2 Com. p. 230 *et seq.*, to which frequent reference has already been made.

[6] Stair, 3, 6, 6; Ersk. 3, 8, 82; Bell, Pr. § 1919. On the subject of the passive liability of heirs, including the liability of the estate for the deeds of an heir three years in possession, see Chapter LXIX.

[7] Stat. 1540, cap. 106, explained by Bell, 1 Com. 749.

[8] Stat. 1661, cap. 24, explained by Bell, 1 Com. 7th ed. 765 *et seq.*

[9] Stat. 1621, cap. 27, as modified by 1661, cap. 24; 1 Bell, Com. 748 and 765.

[10] This is a necessary consequence of the doctrine that the property does not vest in the heir without a written title; as to which see the next division of this section.

and entering as heir to a remoter ancestor, became liable for the debts of the apparent heir to the extent of the value of the estate.[1]

SECTION II.

Service of Heirs-at-Law and Vesting under the Statute.

Personal rights vest by general service; real by infeftment.

196. Subject to the exceptions noticed in treating of apparency, heritable estate possessed by the ancestor on a personal title vested in the heir by general service only, and heritable estate in which the ancestor died infeft vested in the heir only by infeftment, which might proceed either upon a special service or upon a precept or writ of *clare constat* from the superior. Estate to which the heir had not obtained a vested right was said to be *in hæreditate jacente* of the deceased, and the purpose of a service was said to be the transmission of the estate from the ancestor to the heir, or the vesting of the succession.[2] Since the publication of the last edition of this work a fundamental change has been made in this part of the law of succession by the Conveyancing (Scotland) Act, 1874, sections 9, 10, and 13. By section 9 "A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date, and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance, according to the existing law and practice." By the 10th section a form of procedure is provided whereby on a petition to the Sheriff setting forth the facts and deducing the right of the person applying for an entry from that of the person last infeft, a decree may be obtained equivalent to a decree of service, which shall vest the applicant in the lands or estate claimed. By the 13th section the right so obtained is reducible within twenty years after infeftment on such grounds and under such conditions as

[1] See Prof. Bell's observations on this branch of the Act, 1695, cap. 24, in 1 Com. 708; also Chapter LXIX., *infra*.

[2] Stair, 3, 5, 25 *et seq.*; 4, 3, 5; Ersk. 3, 8, 59 *et seq.*; Bell, Pr. § 1817 *et seq.*; Menzies' Conveyancing, 792 *et seq.*; Shaw's Bell, 1034 *et seq.* It has been thought unnecessary for the purposes of this treatise to enter upon the discussion of the forms of service according to the old procedure under brieves retourable to Chancery, as the subject is fully treated in the works above cited.

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would be applicable to a reduction of a proper decree of service. The consideration of the procedure under these clauses dies not full within the scope of this work.

Husband cannot compel wife to serve.

197. A married woman could not be compelled by her husband to make up a title by service to heritable estate to which she has succeeded, though the effect of her refusal was to deprive him of the courtesy in the event of his survivance.[1]

Service as heir-at-law not defeasible by birth of nearer heir.

198. The completion of a title by service as heir-at-law (followed by infeftment in the case of special service) gives the heir an indefeasible title to all estate included under it which belonged to the ancestor at the time of his death, provided the person serving is really entitled to the character of heir. An heir cannot be dispossessed, nor can his title be set aside in consequence of the subsequent birth of an heir nearer in blood to the ancestor than himself. In the case of *Grant* v. *Grant's Trustees*,[2] a father succeeded and served heir to his only son (there being no nearer heir *in utero*); after an interval of two years a daughter was born to him, who, according to the rules of heritable succession, was the nearest heir of her brother, and might have taken up the succession had it been open. The Court refused to sustain a reduction of the service at the instance of the daughter, being of opinion that the precedents relative to service as heir of provision were not applicable to cases of legal succession. It was admitted on all hands that the father's service would have been bad if there had been a child *in utero* when the succession opened; and it may be assumed that in the case in question the father could not have served heir to his son after the birth of his daughter. But it is evident that under the new principle of law introduced by the Act of 1874 this question may arise under altered conditions.

Definition of general service.

199. I. VESTING OF PERSONAL RIGHTS.—General service is an *actus legitimus*, by means of which the character or relation of heir-at-law is judicially established,[3] and the heritable estate of the ancestor, so far as standing on personal titles, vested in the person of that heir.[4] With respect to heritable rights not requiring infeftment, the heir's title is completed by general service. With respect to feudal estate in which the ancestor was not infeft, general service is equivalent to an assignation of the personal title, and

[1] *Ferguson* v. *Cowan*, 3 June 1819, Hume, 222; also Lord President Hope's notes, cited 20 D. p. 662.

[2] *Grant* v. *Grant's Trs.*, 2 Dec. 1859, 22 D. 53.

[3] It will be observed that we treat in this section of service as a means of vesting intestate succession only. The law in relation to vesting by service as heir of provision differs in some important particulars from that of vesting in relation to intestacy. It is considered *infra*, Chapter XXX.

[4] Stair, 3, 5, 25; Ersk. 3, 8, 63; Bell, Pr. § 1848.

enables the heir to take infeftment upon the ancestor's unrecorded conveyance, or, where infeftment is not taken, to transmit the personal right to heirs or assignees. A general service is also a title to the heir to reduce infeftments prejudicial to his right.[1]

Procedure for obtaining general service.

200. General service is now obtained under the provisions of the Titles to Land Act, 1868, re-enacting the clauses of the Service of Heirs Act, 10 and 11 Vict., cap. 47, by petition to the Sheriff of the district within which the ancestor died domiciled, or to the Sheriff of Chancery, and in all cases to the latter where the ancestor was not domiciled in Scotland. The petition must be published within the county of the ancestor's domicile, or edictally. The petitioner must aver and prove the death of the ancestor, the date at or about which the death took place, and the propinquity of the petitioner. Where the service is unopposed, evidence on these points is adduced before the Sheriff *ex parte*, who, if satisfied, pronounces a decree serving the petitioner as nearest and lawful heir in general. The petition and decree are then transmitted to the Chancery record, an extract from which constitutes the title of service.

Objections to general service and title to reduce.

201. No person is entitled to oppose a general service except on the ground that he himself is already served, or is entitled to be served heir in the character alleged,[2] and in practice objections to a service can seldom be effectually maintained except in the form of a competing petition.[3] In cases of competition for service, either of the parties, at any time before proof is begun in the inferior court, may appeal the cause for the purpose of trial by jury in the Court of Session; or, if the proof proceeds before the Sheriff, the cause may be appealed to the Court of Session after judgment in the Sheriff Court. A general service is subject to reduction within the period of the vicennial prescription of services at the instance of any person claiming the character of nearest heir in general.[4] In an action of reduction of a service, the primary question is the title, or, in other words, *the propinquity of the pursuer of the reduction*.[5] The defender has the advantage of a

[1] *Horn* v. *Stevenson*, 1746, M. 16,117; *Carmichael* v. *Carmichael*, 15 Nov. 1810, F.C. Where there has been a prior service, a second service is incompetent, and, from the necessity of the case, it is not required as a title to sue (*infra*, § 202).

[2] *Aitchison* v. *Aitchison*, 7 March 1829, 7 Sh. 558,

[3] *Forbes* v. *Hunter*, 3 July 1810, F.C.; *Cochran* v. *Ramsay*, 1 Sh. 91, N.E. 92; 4 W. & S. 128; *Graham* v. *Graham*, 23 Nov. 1850, 13 D. 125.

[4] Accordingly, the issue in such cases is, whether the pursuer is nearest and lawful heir in general of A. B.; *Willox* v. *Farrell*, 18 July 1846, 8 D. 1226; *M'Lean* v. *M'Lean*, 28 Feb. 1849, 11 D. 880.

[5] Accordingly, the propinquity of the pursuer ought to be set forth in the issues; *Macgillivray* v. *Souter*, 21 Dec. 1860, 23 D. 212.

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subsisting judgment in his favour; and, although he may not be in fact the nearest heir,—although he is not even so near as his competitor, he may successfully defend the action by showing that there is a nearer heir in existence than the pursuer of the action of reduction.[1]

Competency of a second service.

202. A second general service is not competent until the first is reduced.[2] It was formerly supposed that the pursuer of a reduction of a service must obtain himself served heir in general to give him a title to sue. But by the decision of the House of Lords in *Cochran* v. *Ramsay*,[3] the law was settled in an opposite sense. A second service may be produced on the mere production of a subsisting and *ex facie* valid prior service.[4] As a consequence of this rule, it is now held that no written title is required to enable a competing heir to pursue a reduction of a service.[5] As already explained,[6] he must prove his title in the process of reduction if it is disputed; and if he is successful in reducing the subsisting service, he may then obtain himself served heir for the purpose of vesting the succession in his person, and, if necessary, challenging an adverse title.[7]

[1] Such at least has been the understanding of the profession, as it is clearly the logical result of the form in which the issue is put to the jury. According to the rubric of the report of *Miller* v. *M'Donald*, 21 June 1885, 17 D. 973, the doctrine in question was denied in that case. The report itself is very meagre and scarcely intelligible.

[2] *Cochran* v. *Ramsay* (Murdieston case), 11 March 1828, 4 W. & S. 128; *Young* v. *Leith*, 16 Jan. 1844, 6 D. 370; *Macara* v. *Wilson*, 15 Feb. 1848, 10 D. 707.

[3] 4 W. & S. 128.

[4] *Young* v. *Leith*, 6 D. 370. But see *Wilson* v. *Whicker*, 26 June 1852, 14 D. 919, where mutual reductions were sent to trial together.

[5] *Rutherford* v. *Nisbet's Trs.*, 12 Nov. 1830, 9 Sh. 3; *Wilson* v. *Gilchrist's Trs.*, 11 Feb. 1851, 13 D. 636.

[6] *Wilson* v. *Gilchrist's Trs.*, *supra*.

[7] We extract from the opinion of Lord President Inglis in the case of *The Officers of State* v. *Alexander* (25 March 1866, 4 M. 741, 745), some instructive observations on the theory of the establishment of claims of propinquity:—"It is a well-known principle of the law of heritable succession in Scotland, that a person who is entitled *jure sanguinis* to take up the heritable succession of a person deceased, may do so at any time, provided he is not anticipated by somebody else acquiring a right in the meantime, and having the right fortified by prescription. No lapse of time will prevent any person from asserting his *jus sanguinis*, and taking up the succession to a man who died two or three hundred years ago. . . . A man procures a brieve for serving himself heir in special to his ancestor, and he fails in establishing his propinquity, and the court of service refuses to serve him. That is not *res judicata*; he may purchase another brieve, and a third brieve, and twenty brieves in succession, and may fail in all the nineteen, and succeed in the twentieth. In like manner, he may obtain himself served upon what turns out to be insufficient evidence, and a competitor challenges his service, and has it reduced. Still, even although in the process of reduction additional evidence is led and issue is joined between the parties in this Court, the decree of reduction is not *res judicata*. The claimant may still sue out another brieve of service, and try his case again. . . . If both parties take out brieves, and these brieves come up as competing brieves by advocation, then a full and complete trial of the case will no doubt be had between the parties, and probably the result of such a decision as that would

Service *cum beneficio inventarii.*

203. At common law an heir in general was subject to a universal responsibility for the debts and obligations of his ancestor without limitation to the value of the succession.[1] By the Act 1695, cap. 24, which is founded on the Civil Law and on equitable grounds, the obligation was modified to the effect of enabling the heir to serve *cum beneficio inventarii,* and thereby to limit his responsibility to the value of the estate. By this Act it was provided that, on following out certain proceedings directed to the object of ascertaining the true value of the succession, the heir's responsibility should be limited to the value of the heritage given up in the inventory.

Limitation of liability by specification.

204. Under the procedure introduced by the Service of Heirs Act, and incorporated with the Titles to Land Act, 1868, it was made competent to apply for a general service, the effect of which is to be limited to lands or other heritages embraced in a particular specification thereof annexed to the petition; but this form of service is superseded by the Conveyancing Act, 1874, section 12, according to which heirs are not liable in any case beyond the value of the estate to which they succeed.

Entry of heirs by precept or writ of *clare constat.*

205. II. VESTING OF REAL RIGHTS.—For the purpose of vesting the right to estate in which the ancestor died infeft, the heir may either proceed by way of special service, the extract of which is now a warrant for infeftment,[2] or he may at once obtain infeftment upon an entry from the superior under a writ (formerly a precept) of *clare constat.* The writ of *clare constat,* as it name implies, is a form of entry properly applicable to cases of undisputed succession, by which the superior acknowledges the grantee to be the heir entitled to succeed to the lands described in the writ.[3] Under the old forms the writ contained a precept of sasine for infefting the heir in the lands. Superiors were not bound at common law to grant an entry by *clare constat,* but under the Titles to Lands Act, 1868, section 101,[4] they are bound to do so on production of the last charter, together with a decree of general or special service establishing the propinquity of the heir. An entry by *clare constat* is invalid if granted by a superior who is not himself duly entered;[5]

be to constitute a *res judicata;* but I know of no other way in which the thing can be brought to a final conclusion except in that form." In accordance with these views, it was found to be incompetent to bring a declarator that another person is not the heir of the deceased.

[1] 1 Bell's Com. 7th ed. 703-4.

[2] 10 and 11 Vict., cap. 47, § 21, as modified by the Titles to Lands Acts.

[3] Ersk. 3, 8, 71; Bell, Pr. § 1817 *et seq.;* Shaw's Bell, p. 1034. Where the immediate heir has died without taking up the succession, the next heir ought to enter by service; Bell, Pr. § 1819; Menzies, Convey. 3d ed. 805. And see *Landales* v. *Landale,* 1752, M. 14,465; and *Finlay* v. *Morgan,* 1770, M. 14,480.

[4] 32 and 33 Vict., cap. 116, § 101.

[5] *Dickson* v. *Syme,* 1801, M. "Tailzie," App. No. 7.

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but it may be validated by accretion, if the superior obtain infeftment in the lifetime of the grantee.[1] Writs of *clare constat* are effectual during the lifetime of the grantee, notwithstanding the death of the superior,[2] but are not assignable ;[3] and if the grantee die uninfeft, that is, without recording the writ in the Register of Sasines, he is held to be unentered, and the estate does not pass to his heirs. Entry by *clare constat* is only a title to the specific estate,[4] it only implies passive representation to the extent of the value of the estate,[5] and it is not protected from challenge by the vicennial prescription.[6]

Completion of real right by special service.

206. Special service is a judicial proceeding for establishing the right of inheritance in relation to estate in which the ancestor died infeft. The procedure under the Service of Heirs Act (now the Titles to Land Act, 1868) is similar to that required in the case of petitions for general service, with this difference, that as the object is to obtain infeftment, the lands or heritages must be specified in the petition and decree. Under the Titles to Land Act, 1868, infeftment may be taken either by recording the decree itself (in which a precept of sasine is not now necessary), or by recording a writ of *clare constat* from the superior, proceeding on the narrative of the decree. The right of property does not vest until infeftment is taken.[7] The declaration in the Service of Heirs Act (incorporated in the Titles to Land Act, 1868, section 46) to the effect that a decree of special service should be equivalent to a disposition and assignation from the ancestor, appears to have been intended to save the right of the heir dying before infeftment.[8] But it was held by a unanimous judgment of the First Division of the Court that the decree is equivalent to a disposition only for the purpose of enabling the heir to obtain infeftment, but not to the effect of vesting any right before infeftment is taken.[9] A special service implies a general one in the same character and to the same lands, and will therefore be available for completing a title by notarial instrument in the event of the ancestor's infeftment proving defective or informal.[10]

[1] Stair, 2, 8, 1 ; Ersk. 2, 7, 3 ; 1 Bell, Com. 7th ed. 737.

[2] 32 and 33 Vict., cap. 116, § 103.

[3] Precepts of *clare constat* are excepted from the provisions of the Act 1693, cap. 35, by which other warrants of infeftment were made transferable.

[4] Ersk. 3, 8, 71 ; Bell, Pr. § 1823.

[5] Bell, Pr. § 1023 ; *Farmer* v. *Elder*, 1683, M. 14,003 ; *Rosebery* v. *Primrose's Exrs.*, 1766, 5 Br. Sup. 926. But see Ersk. 3, 8, 71.

[6] Ersk. *ut supra*. The Act establishing the vicennial prescription of retours (1617, cap. 13) does not apply to entries by *clare constat*.

[7] Ersk. 3, 8, 78 ; Bell, Pr. §§ 1834, 847.

[8] Per Lord Curriehill in *Moreton's Trs.* v. *Moreton*, 16 D. 1110, note.

[9] *Moreton's Trs.* v. *Moreton*, 19 July 1854, 16 D. 1108.

[10] At common law a special service was held to import a general one in the same character for all purposes.

Defences to special services, and title to reduce.

207. Petitions for special service may be opposed by competing claimants, and also by disponees of the ancestor if infeft; for a recorded disposition is an exclusive title to the subjects.[1] Under the old law possession on a disposition, without procuratory or precept of sasine, could not be used to exclude a special service;[2] and the disponee could only attack the heir's title indirectly by bringing an action to compel him to convey, called an action of constitution, which was followed by a separate action (in modern practice combined with the first action) for adjudication in implement.[3] A disponee would not now be required to oppose an application for special service, as he has it in his power instantly to put his disposition on record, or to expede a notarial instrument upon it if it is a general conveyance, and thereby to acquire a public title exclusive of that of the heir-at-law and his assignees. Applications for special service may be appealed, and decrees brought under reduction, in the same manner as in the case of general service; and a subsisting decree of special service is an absolute bar to the granting of a service, whether special or general, to a different individual in the same character.[4] The impediment may, as already seen, be removed by an action of reduction, to the successful prosecution of which the establishment of a title preferable to all others is a necessary condition.[5]

Tentative title by adjudication on trust-bond.

208. The entry of heirs by adjudication on a trust bond is sometimes resorted to as a tentative title for the purpose of challenging an adverse right without incurring passive representation.[6] It need never be resorted to where a title can be made up by general service; for it was decided under the old law that general service did not infer passive representation, unless the estate passed.[7] And now passive representation in virtue of a legal title is in all cases limited to the value of the estate. According to Professor Bell, the heir grants a bond for a sum above the value of the estate.[8] On this bond the creditor proceeds to adjudge the estate in implement,

Form of procedure therein.

[1] This appears from the nature of the inquiry in the old form of service, as to which see Ersk. 3, 8, 67; but the service is not excluded by a disposition to another party on which infeftment has not been taken; *Suttie* v. *D. of Gordon*, 1733, M. 14,457; *Douglas* v. *D. of Hamilton*, 1761, M. 14,457. See *Catton* v. *Mackenzie*, 1870, 8 M. 713 and 1049.

[2] Cases of *Suttie* and *Douglas*, *supra*.

[3] Ersk. 2, 12, 50; 1 Bell, Com. 7th ed. 783.

[4] *Cochran* v. *Ramsay*, 11 March 1828, 4 W. & S. 128.

[5] *Supra*, § 201.

[6] Bell, Pr. § 1859. By Act of Sederunt, 28 Feb. 1662, confirmed by Statute 1695, cap. 24, intromission on this title infers passive representation, correcting the doctrine laid down in *Glendonwyn* v. *E. of Nithsdale*, 1662, M. 9738 and 9741.

[7] *E. of Fyfe* v. *Duff*, 7 March 1828, 6 Sh. 698, and authorities there cited.

[8] A deed in trust for reconveyance does not afford a good ground for the completion of a tentative title, because the granter is not thereby divested of his radical title to the estate; *Dunlop* v. *Cochrane*, 31 March 1824, 2 Sh. (Ap. Ca.) 115. Would a trust for sale be sufficient?

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and, having completed his title, is in a position to reduce the adverse title. If the action is successful, the bond and decree of adjudication are conveyed to the heir, in whose person the debt is extinguished *confusione*.[1]

Exceptions.

209. In connection with the subject of apparency, the questions that have arisen in relation to the vesting of long leases, and the vesting of beneficial interests under unexecuted trust-deeds in the person of the beneficiary's heir-at-law, have already been noticed. In the former case service does not appear to be necessary to vest the right; in the latter case it was necessary under the common law.[2]

SECTION III.

Vesting of Terce and Courtesy in Right and in Title.

Terce vests by survivance and service;

210. The right to terce, like the heritable succession itself, accrues by survivance, but service is necessary to vest an assignable interest. A tercer unserved has not even the rights of an apparent heir in relation to her liferent interest. She may receive payment of her third of the rents, but is unable to use diligence against tenants or possessors.[3] Without service the right to unrecovered arrears does not transmit to the widow's representatives.[4] The 9th section of the Conveyancing Act, 1874, which vests without service rights "descendible to heirs," would appear not to contemplate the case of the widow's right to arrears of rents covered by her terce.

Or by divorce.

211. The terce also accrues by the dissolution of the marriage by divorce on the ground of adultery or desertion by the husband.[5] The right acquired by the service of a tercer is of the nature of a personal right to heritable estate. A real right may be acquired by the process of kenning, or by a voluntary partition, usually carried out through the medium of a submission.

Procedure in the service of tercers.

212. I. Acquisition of a vested right by Service.—Service of a tercer still proceeds under the ancient form of process, commencing with a brieve from Chancery. The brieve[6] is in general

[1] Bell, Pr., *ut supra*.

[2] *Supra*, § 181.

[3] Ersk. 2, 9, 50; *Yoeman* v. *Oliphant*, 1666, M. 15,843; *Barclay* v. *Scott*, 1675, M. 15,844.

[4] *M'Leish* v. *Rennie*, 21 Feb. 1826, 4 Sh. 485, N.E. 491. As to the necessity of service to vest the right, see Stair, 2, 6, 15; Ersk. 2, 9, 55; and *contra*, Bankton, vol. i. p. 661.

[5] *Supra*, § 159.

[6] For the form of the brieve and details of procedure under it, reference is made to Stair, 4, 3, 11; and 1 Jurid. Styles, 4th ed. p. 325, and Stat. 1503, cap. 94. The case of *Craik* v. *Penny*, 1891, 19 R. 339, furnishes an example of this somewhat unusual form of process. In this case it was held that the heir could not claim a sist from the Sheriff on the ground either that the validity of the marriage was in question, or that the

terms, and is addressed to the Sheriff of the county where the lands lie, or to the Sheriff of Edinburgh if the lands are in different counties.[1] The procedure is regulated by the Statute 1503, cap. 94. The questions remitted to the assize are, Whether the claimant was lawfully married? and Whether her husband died last vest and seised in the fee of the lands? The widow presents a claim affirming her marriage, and specifying the lands.[2] With reference to the first point, it is declared by Statute[3] that the applicant is entitled to be served if the alleged marriage was not challenged in the lifetime of the deceased, and if the applicant was habit and repute his lawful wife, though the heir should offer to prove that she was not lawfully married. In practice it is held that the assize are not entitled to judge of this question; the heir must bring an action before the Consistorial Court, now the Court of Session.[4]

Questions as to husband's title.

213. Upon the second point, the jury must be satisfied that the deceased proprietor was infeft in the lands mentioned in the claim, the best evidence of which is the production of the sasine or registered disposition, or an extract from the record.[5] It has been seen that a proprietor is not divested by the execution of a trust for creditors, or for purposes which do not exhaust the estate, or by a deed in which his liferent is reserved together with a power of disposal of the fee, and that his radical right is sufficient to support a claim of terce.[6] In such cases, accordingly, the right to terce is founded not on the infeftment upon the qualified conveyance, but on the infeftment which preceded it, and which constituted the granter's title. The subject from which it is claimed is the value of the heir's reversionary interest.[7]

Judgment and process of review.

214. The judgment of the Sheriff, interponing his authority to the verdict upon the brieve, is the tercer's title. It is not retourable to Chancery, and cannot be brought under review by advocation after verdict.[8] In a reduction the pursuer must take an issue upon the points involved in his allegations;[9] and where these relate to the state of the ancestor's title, he must prove not

widow had accepted a conventional provision secured over lands in a foreign country. Opinions were expressed to the effect that the special rules as to advocations and appeals in services are inapplicable, and that in a process of service of a tercer the proceedings may be appealed to the Court of Session at any stage of the cause.

[1] 1 and 2 Geo. IV., cap. 38, § 11.

[2] 1 Jurid. Styles, 4th ed. p. 326.

[3] 1503, cap. 77.

[4] Ersk. 2, 9, 50.

[5] Stair, 4, 3, 11; Erskine and Fraser, *ut supra*.

[6] *Supra*, § 162.

[7] *Belshier* v. *Moffat*, 1779, M. 15,863; *Bartlett* v. *Buchanan*, 21 Feb. 1811, F.C.

[8] Stair, 4, 3, 17, and 18. See also *Cathcart* v. *Rocheid*, 1772, M. 7663, and *M'Neight* v. *Lockhart*, 30 Nov. 1843, 6 D. 139, per Lord Justice-Clerk Hope.

[9] *Paxton* v. *Paxton*, 13 June 1840, 2 D. 1102.

CHAPTER V.

only that the title was informal, but that the defects were such as could not be rectified in the ancestor's lifetime.[1]

Effect of service of a tercer.

215. Service vests in the widow a *pro indiviso* usufructuary interest in the estate to the extent of her third.[2] Service vests the right to arrears,[3] which may be recovered from the tenants, or from the heir if he has received them.[4] The tercer's rights commence at the same time as the heir's,[5] and her means of enforcing payment by action and diligence are the same,[6] except that, as her right is subordinate to that of the heir, she has not the power of removing tenants, nor can she interfere with the exercise of that power on the part of the heir.[7]

Form and application of the process of kenning.

216. II. ACQUISITION OF A REAL RIGHT BY KENNING.—After service as a tercer, the widow is entitled to have her *pro indiviso* usufructuary interest divided.[8] This is accomplished under an old form of process called *kenning to the terce*, which differs in its procedure from an ordinary process of division. The Sheriff, or a valuator selected by the parties, proceeds to the ground, and after determining by lot whether the division shall be commenced "by the sun or the shade," he sets off the first two acres for the heir, and the third for the widow, and so on till the whole terceable estate is divided.[9] Indivisible subjects, as houses, pasturages, and other servitudes and heritable debts, are not divided in modern practice, but one-third of the annual rent or value is given to the widow.[10] The valuation being certified to the Court in writing, the

[1] *Rose* v. *Fraser*, 1790, M. "Terce," App. No. 1; *Campbell* v. *Brown*, 17 Feb. 1829, 1 Jurist, 83; and see *Hamilton* v. *Boswell*, 1716, M. 3117; affirmed, Roberts, 346.

[2] 1 Bell, Com. 7th ed. 58; Stair and Erskine, *infra*.

[3] Stair, 2, 6, 15; Ersk. 2, 9, 55; *M'Leish* v. *Rennie*, 21 Feb. 1826, 4 Sh. 485, N.E. 491.

[4] *Crighton* v. *Hamilton*, 1532, M. 15,835; *Semple* v. *Crawford*, 1625, M. 15,837; *Easthouses* v. *Hepburn*, 1627, M. 15,838, and authorities in preceding note.

[5] *Belshier* v. *Moffat*, 1777, M. 15,863; *Easthouses* v. *Hepburn*, *supra*.

[6] *Veitch*, 1632, M. 16,087; *A* v. *B*, 1632, M. 15,842; *Fea* v. *Traill*, 1731, M. 16,115.

[7] *Barclay* v. *Scott*, 1675, M. 15,844.

[8] Lord Fraser (vol. i. p. 624 of original edition), not without support from previous authorities, distinguishes the rights acquired by service and kenning respectively as *jus ad rem* and *jus in re*. But, in substance, the widow's right is as real before division as after. She may compel tenants to pay to herself, and may personally use unlet subjects. Kenning is, in substance, merely a process of division of estate previously held *pro indiviso*.

[9] Stair, 2, 6, 14, and 15; Ersk. 2, 9, 50. The authority of these authors is in favour of a more convenient mode of division, *e.g.*, by dividing the whole estate into three portions, or assigning alternate subjects to the heir and the widow. In practice this is done under a submission to a person accustomed to value lands. The parties may then execute a deed of division; but it is understood that the possession of the widow upon the title of her service and decree of division is sufficient to give her a real security over the rents. See *Boyd* v. *Hamilton*, 1805, M. 15,874.

[10] Bell, Pr. § 1602; *Mackenzie*, 1628, M. 15,838; *Logan* v. *Galbraith*, 1665, M. 15,842, 1 Br. Sup. 507.

Sheriff interpones his authority, and afterwards proceeds to the lands and gives personally, or by a mandatory, symbolical possession of the terce lands by delivery of earth and stone of the ground.[1] The title is completed by an instrument of possession, which does not enter the Register of Sasines.[2]

Rights of a widow kenned to her terce.

217. The powers of a tercer, served and kenned, are those of a liferenter by constitution. She has the right of occupation, and the powers of letting the terce lands and removing tenants.[3] She is, therefore, under the same obligations as an ordinary liferenter [4] to use the subject *salva rei substantia*, and to refrain from waste or dilapidation. During her possession the terce lands cannot be alienated except under reservation of her liferent, or upon such terms as she may agree to.[5]

Courtesy vests by possession.

218. III. VESTING OF COURTESY.—Courtesy vests by the husband's survivance of his wife, and requires no service or other proceeding either to vest the usufructuary interest or to give an active title.[6] It is said to be an extension or prolongation of the husband's *jus mariti* and right of administration; but although the nature of the right is similar, if not identical, the subjects over which it extends are less extensive, for, as we have already seen, courtesy does not extend to conquest.

Right to levy arrears of rent.

219. It has been laid down,[7] on the authority of an ancient decision, that the right of courtesy, like the *jus mariti*, only vests a title to the fruits of the estate after they have been actually received, and that the right to unlevied rents, &c. does not transmit to executors. The case referred to, as Lord Fraser observes, was really decided on the plea of *bona fide* consumption;[8] and, in any view, the decision can scarcely be accepted as conclusive on the question of vesting.

[1] Stair and Erskine, *ut supra; Wamphray*, 1669, 2 Br. Sup. 440.

[2] 1 Jurid. Styles, 4th ed. p. 327.

[3] Ersk. 2, 9, 50; *Maxwell* v. *Tenants*, 1630, M. 15,842.

[4] *Supra*, § 167.

[5] 1 Bell, Com. 7th ed. 58; *Boyd* v. *Hamilton*, 1805, M. 15,874.

[6] Stair, 2, 6, 19; Ersk. 2, 9, 52.

[7] Bell, Pr. § 1608; 2 Fraser, 2d ed., 1124.

[8] *M'Auley* v. *Watson*, 1636, M. 3112; 1 Br. Sup. 358.

CHAPTER VI.

ORDER OF LEGAL SUCCESSION IN RELATION TO THE MOVEABLE ESTATE.

I. Next of Kin and Personal Representatives.
II. Legitim (from Estate of Father or Mother).
III. Jus Relictæ.
IV. Husband's Interest in the Wife's Succession.

What part of a defunct's personal estate becomes intestate succession.

220. Succession in moveables, or executry, may be defined to be the devolution by law of the moveable or personal estate of a person dying domiciled in Scotland, and intestate; or the devolution by law of so much of his estate as he was by the law of Scotland entitled to dispose of by will.[1] At common law no married person was entitled to dispose of the entirety of his or her personal property by will or testamentary disposition. The personal estate of the wife merged by marriage in that of the husband, and the fiction of a *communio bonorum* was invented to explain the right of property which the husband thus acquired over the wife's personal estate.[2] But the theory of *communio bonorum*, however unmeaning as applied to the rights of the spouses *inter vivos*, had important consequences in relation to their succession. Upon the dissolution of the marriage the goods in communion were divided. The wife, if she survived, and her heirs, if she predeceased, took the one-half of the joint estate, limited to one-third in the event of there being issue of the marriage surviving at the period of division. The husband or his heirs took the other half, if there were no issue surviving. If there were children of the marriage surviving, and the division took place upon the death of the husband, the widow had one-third, under the name of *jus relictæ;* the children another third, under the name of legitim (*portio legitima*); the remaining third part only was subject to testamentary disposition. If the division took place at the death of the wife, her share passed to her legatees, or, in case of intestacy, to the children or next of kin. The two-third parts of the joint estate, which, in case of there being a family, remained with the husband, were subject to the children's legitim, which, however, became payable only on the father's death, and then resolved into a claim to one-half of his free succession. Such

[1] Stair, 3, 8; Ersk. 3, 9; Bell, Pr. § 1860 *et seq.*

[2] See 1 Fraser, Pers. and Dom. Rel., p. 322 *et seq.* of 1st edition.

is a brief and necessarily imperfect summary of the law of division of the goods in communion prior to the passing of the Moveable Succession Act, 1855.[1]

Effect of the Moveable Succession Act.

221. The Moveable Succession Act,[2] by depriving the wife's legatees and next of kin of their claims to a share of the succession in the case where the wife predeceases the husband, has removed the only solid support on which the doctrine of *communio bonorum* was rested. In the existing state of the law it will be convenient to disregard this fiction, and to consider *jus relictæ* as a legal provision of the same nature as terce, courtesy, and legitim.[3]

SECTION I.

Next of Kin and Personal Representatives.

Order of succession at common law.

222. I. Succession accruing before 25th May 1855.—The lines of succession in moveable estate at common law, and the order of preference within these lines, is the same as in heritage, but the principle of the succession is that of equal distribution amongst the nearest of kin or relatives nearest in degree to the intestate. The children of relatives in any degree are considered more remote than their parents; grandchildren are a degree further removed, and so on.[4] There is no representation as in heritage;[5] and, from what has been already said, it follows that there is no right of primogeniture, no preference of males, and no distinction of heritage and conquest. The heirs entitled to the moveable succession are called next of kin.

Priority of the full-blood over the half-blood.

223. In each line of succession relatives of the full-blood exclude those of the half-blood consanguinean and their descendants; but the half-blood of a nearer *line* of succession excludes the full-blood of a more remote line.[6] The half-blood uterine and the maternal relatives are altogether excluded from the succession.

224. The lines of succession are—(1) Descendants; (2) Collaterals; (3) Ascendants, with the collaterals of the different ascendants in their order.[7]

[1] The rules of division of the goods in communion were still further complicated by the condition that all rights acquired by marriage became void in the case of the marriage being dissolved within a year and day without the birth of a living or viable child. The test of viability, according to the law of Scotland, was that the child had been heard to cry, and this criterion is still applicable in other cases where questions of vesting depend on the birth of a viable child.

[2] 18 Vict., cap. 23.

[3] *Infra*, Sections II. and III.

[4] Ersk. 3, 9, 2; Bell, Pr. §§ 1860, 1861.

[5] *Ibid.*; *Fowlis* v. *Gilmour*, 1672, 2 Br. Sup. 618.

[6] Ersk. *supra*; *Gemmil* v. *Gemmil*, 1729, M. 14,877.

[7] This is more fully explained in connection with heritable succession, *antea*, Chapter IV., section I.

CHAPTER VI.

Table showing the order of succession at common law.

225. According to the rules previously explained, the order of succession will be as follows :—

I. (1) The intestate's children ; (2) his grandchildren ; (3) his great-grandchildren, &c. &c.

II. (1) The intestate's brothers and sisters of the full-blood ; (2) his nephews and nieces of the full-blood, or their descendants of the nearest degree ; (3) the intestate's brothers and sisters of the half-blood ; (4) his nephews and nieces of the half-blood, or their descendants of the nearest degree.

III. The intestate's father.

IV. Collaterals of the intestate's father, viz.—(1) uncles and aunts of the full-blood ; (2) first cousins, or their descendants of the nearest degree ; (3) uncles and aunts, being half-brothers and half-sisters consanguinean of the intestate's father ; (4) cousins, being children of the above, or their descendants of the nearest degree.

V. The intestate's grandfather.

VI. Collaterals of the intestate's grandfather of the nearest degree as before, &c. &c.

No representation in moveable succession.

226. Representation being admitted in heritable, but not by the common law in relation to moveable succession, it follows that an heir in heritage succeeding by representation is not one of the next of kin. For example, if a person should die intestate leaving younger children, and a grandson by an eldest son deceased, the grandson would be the heir in heritage, but would not be of the next of kin, and would not be entitled to a share of the moveable succession.[1]

Principle of collation.

227. Where the heir in heritage is also one of the next of kin, he may claim a share of the moveable succession, but only on condition of collating or sharing the heritage with the other next of kin. An heir who is the sole next of kin will take both the heritable and the moveable succession ; and heirs-portioners who are sole next of kin will share both, not on the principle of collation, but of equal right. The subject of collation in its relations to the division of executry and legitim is elsewhere considered.[2]

Succession to wife's share of goods in communion.

228. The succession to the wife's share of the goods in communion fell, first, to the children (of whatever marriage), or their nearest descendants ; and next, to the relatives in the collateral and ascending lines in the order of law.[3]

[1] *M'Caw* v. *M'Caw*, 1787, M. 2383 ; and see *Anstruther* v. *Anstruther*, 20 Jan. 1836, 14 Sh. 272. The suggestion of Erskine, 3, 9, 3, that an heir taking by representation may be entitled to collate, is evidently erroneous.

[2] *Infra*, Chapter VIII.

[3] Bell, Pr. § 1580.

Title of the wife's representatives.

229. Where the children of a marriage succeeded to their mother's share of the goods in communion, they were entitled, if of full age, to demand payment immediately after her death, otherwise as soon as they had respectively attained the age of majority.[1] The wife's children by a previous marriage might demand immediate payment, by themselves or their guardians. The claim of the wife's children or other next of kin was a debt in a question with the head of the family or his creditors, for which they were entitled to rank as personal creditors in bankruptcy.[2] The fund to be divided consisted of the husband's free estate as at the date of the dissolution of the marriage.[3]

Operation of the wife's claim in former practice.

230. It is believed that, in practice, the claim of the wife's next of kin was not often insisted in. Where there was no family, and no marriage-contract renouncing the right, the wife would naturally leave her share of the common property to her husband by will. If there were a family, the claim would not be made in the father's lifetime; nor after his death if the father made an equitable will. In many cases, doubtless, the wife's collateral relatives were prevented from making a claim through ignorance of the strange theory of law which gave rise to it. In other cases the claim was made so long after the opening of the succession as to give rise to questions of prescription, of bar by *mora*, and of liability to interest. Under the present law such claims can only be made in respect of successions opening prior to the Moveable Succession Act, 1855, and the questions arising under them are no longer of practical importance.[4]

Moveable Succession Act.

231. II. Succession accruing since 25th May 1855.—By the Moveable Succession Act, which passed on the 25th May 1855,[5] the law of intestate succession underwent a very important alteration. The Act applies to all successions accruing after its date.[6] The Act itself will be found in the Appendix. It may be sufficient here to notice the effect of its provisions.

[1] Ersk. 3, 9, 21; Bell, Pr. § 1580.

[2] 1 Bell, Com. 7th ed. 682.

[3] The wife's funeral expenses have been held to be a charge on the succession accruing to her next of kin; *Marshall* v. *Finlays*, 1747, M. 3948; *Findlay* v. *Calder's Exrs.*, 1747, M. 5928.

[4] See on the subject generally, 1 Fraser 595-599; *Hog* v. *Lashley*, 15 Dec. 1790 and 7 May 1792, 3 Pat. 247; *Steele's Trs.* v. *Cooper*, 16 June 1830, 8 Sh. 926; *Hardie* v. *Kay's Trs.*, 12 Feb. 1823, 2 Sh. 213, N.E. 187; *Menzies* v. *Livingston*, 5 July 1838, 16 Sh. 1268; *Smith* v. *Barlas*, 15 Jan. 1857, 19 D. 267; *Kennedy* v. *Bell*, 17 Dec. 1859, 22 D. 269, 2 Feb. 1864, 2 Macph. 587. On the plea of bar by *mora*, see *Lawson* v. *Lawson*, 1777, M. "Legitim," App. No. 1; *Hardie* v. *Kay's Trs.*, *supra*; *Cullen* v. *Wemyss*, 16 Nov. 1838, 1 D. 32; *Howden* v. *Howden*, 20 Jan. 1841, 3 D. 388; *Kennedy* v. *Bell*, 2 Feb. 1864, 2 Macph. 987; May 14, 1868, 6 M. (H.L.) 69. In *Wight* v. *Brown*, 27 Jan. 1849, 11 D. 459, it was held that the insurance money due on a policy of insurance effected by a husband on the life of his wife did not fall within the scope of the claim.

[5] 18 Vict., cap. 23.

[6] § 1.

CHAPTER VI.

Representation under the Statute.

232. Section 1 introduces the principle of representation into moveable succession in the descending line, and also in the principal collateral branch, viz., brothers and sisters of the intestate and their descendants.[1] The effect of this is, that in these lines the succession may devolve upon relatives in several different degrees. The succession may, for example, fall to be divided between a son, a grandson by a deceased child, and a great-grandson whose father and grandfather had both predeceased the common ancestor, this common ancestor being either the intestate or his brother or sister. Representation under the Statute is not admitted among collaterals of the ascending line, but only among collaterals of the intestate.[2] The next of kin have right to the office of executor in preference to persons taking under the Statute.[3]

233. The case contemplated by the 1st section of the Moveable Succession Act is the case "Where any person who, had he survived the intestate would have been among his next of kin, shall have predeceased such intestate," and the principle of distribution under the 1st section is that of division *per stirpes*. The hypothesis of the Statute then is, that the number of the actual next of kin has been diminished by death, and in this case the issue of the deceased member of the family are to "have right to the share of the moveable estate of the intestate to which the parent, . . . if he had survived the intestate, would have been entitled." But the Statute does not contemplate the case of all the intestate's children predeceasing him, so that the succession passes to grandchildren in their own right; or the case of all the intestate's brothers and sisters predeceasing him, so that the succession passes to nephews and nieces in their own right. In such cases it is plain enough that the surviving grandchildren, or nephews and nieces, are the intestate's next of kin, and that the estate is divisible amongst them *per capita*, and it was so held, in the case of nephews and nieces, in a considered judgment of the Court.[4]

Extension of collation to case where person taking by representation is also the heir.

234. Under section 2, which enables heirs taking by representation to collate the heritable estate with the executry, the principle of division *per stirpes* is consistently carried out in the distribution of the common fund resulting from the collation of these estates. The Statute next proceeds to regulate the interest to be taken by the issue of the person whom the heir represents, in the case where the heir declines to collate.[5] The principle adopted is, that the issue of the person "represented," other than the heir-at-law, are to be placed in the same position as they would have occupied if

[1] See *Ormiston* v. *Broad*, 11 Nov. 1862, 1 Macph. 10.
[2] *Ormiston* v. *Broad*, *supra*.
[3] § 1.
[4] Sp. Ca. Turner, 1869, 8 M. 222.
[5] § 2.

the person represented had succeeded to the heritable estate and collated its value with the executry, and his issue had inherited from him the sum which he received as the difference between the value of his share of the aggregate succession and the value of the heritable estate. This at least is what appears to have been in the mind of the framer of the singularly involved proviso at the end of the 2d section of the Act. This right of succession has not been conceded to *all* the descendants of the person represented, other than the heir-at-law, but only to "brothers and sisters of the heir and their descendants in their place." Where, therefore, the person who would have succeeded if he had survived the intestate is represented by a grandson, his younger children have no right to a share of the moveable estate, as they are not brothers and sisters of the heir, but are brothers and sisters of the heir's father. This is a case which might actually happen, where the brothers and sisters of the intestate and their descendants were his personal representatives, and the heir was the grandson of one of the brothers.

Exclusion of younger children of deceased next of kin in certain cases.

235. Where an intestate is survived by his father, and also by relatives of the principal collateral branch, the father has right to one-half of the succession;[1] and where the father does not survive, but the mother does, the latter has right to one-third of the succession.[2] Failing brothers and sisters german or consanguinean, and their descendants, the collateral relatives uterine have right to one-half of the succession.[3]

Extension of right of succession to intestate's father, mother, and uterine relatives.

236. The next section[4] takes away the right of the next of kin, or testamentary representatives of a wife predeceasing her husband, to a share of the goods in communion. Under the two concluding sections the rule as to marriages dissolved within year and day is abolished;[5] and executors-nominate are deprived of all right of succession in their character as such.[6]

Abolition of claim of the wife's personal representatives.

237. The abolition of the claims formerly competent to the executors or next of kin of married women, and the distinction in relation to marriages dissolved within year and day, has simplified the division of the succession in the case of married persons. There is now no division except on the death of the husband. When that event occurs, the succession is divisible into three shares,—Legitim, *Jus Relictæ*, and Executry. Where the wife has predeceased, there is no *jus relictæ*, and the legitim and executry each amount to a half of the succession. Where the deceased leaves a widow but no children surviving him, half of the succession is *jus*

Effect of the changes introduced by this Statute.

[1] § 3.
[2] § 4.
[3] § 5.
[4] § 6.
[5] § 7.
[6] § 8.

CHAPTER VI.

relictæ and half is executry. Where the deceased leaves neither widow nor children surviving him, the whole succession is executry.

Crown is *ultimus hæres in mobilibus.*

238. III. CADUCIARY RIGHT OF THE CROWN.—In moveables, as in land, the Crown takes as *ultimus hæres* on the failure of heirs connected by blood with the defunct.[1] The most frequent case is that of bastardy. The property of a bastard dying without issue, and intestate, necessarily falls to the Crown for want of collateral heirs.[2] The Crown usually appoints a donatory. The liability of the Crown or donatory for the deceased's debts is limited to the amount of the estate.[3] The Crown is not entitled to succeed as conditional institute under a destination to heirs.[4]

Confirmation not necessary to vest the right of succession.

239. IV. VESTING OF MOVEABLE SUCCESSION.—In virtue of the Act 4 Geo. IV., cap. 98, intestate succession vests in the personal representatives of the deceased by survivance without confirmation.[5] At common law moveable succession did not vest until the next of kin had obtained a title of possession by confirmation as executors;[6] and therefore, when one of the next of kin died before he had completed a title by confirmation, his interest did not pass to his executors, but fell to be divided as part of the general succession amongst the surviving next of kin at the period of confirmation.

Right vests for all purposes by the Statute.

240. The language of the Act only makes succession accruing to next of kin transmissible to "representatives;" but this has been interpreted to mean that the right vests by survivance for all purposes. The right of next of kin unconfirmed is therefore transmissible to assignees,[7] and is subject to the diligence of arrestment.[8]

Character of next of kin fixed at ancestor's death.

241. Since the Confirmation Act of 4 Geo. IV.[9] came into operation, the characters of next of kin and of personal representatives attach and are irrevocably fixed at the time of the death of the predecessor. Where, therefore, an interest in succession devolves at a subsequent period to next of kin, or representatives (as it may, either in virtue of an express destination or in consequence of a lapse), no person can lay claim to it in the character of next of

[1] See Erskine, 3, 10, *passim*; *Finnie* v. *Commrs. of the Treasury*, 30 Nov. 1836, 15 Sh. 165.

[2] Stair, 4, 12, 1; Ersk. 3, 10, 8; *Halcro* v. *Somervill*, 1626, M. 1348. By 6 Will. IV., cap. 22, bastards are enabled to bequeath their moveable estate by testament, which formerly they were not permitted to do.

[3] Ersk. 3, 10, 4.

[4] *Torrie* v. *Munsie*, 31 May 1832, 10 Sh. 597.

[5] 4 Geo. IV., cap. 98, § 1. Moveable succession by will or deed vests at common law without confirmation, contrary to the rule in heritable succession, where the right vests only by service as heir of provision; *Robertson* v. *Gilchrist*, 25 Jan. 1828, 6 Sh. 446.

[6] If any one of the next of kin had confirmed, he was considered a trustee for the rest. See *Spalding* v. *Farquharson*, 15 May 1811, F.C.

[7] *Frith* v. *Buchanan*, 3 March 1837, 15 Sh. 729.

[8] *Mann* v. *Thomas*, 9 Feb. 1830, 8 Sh. 468.

[9] 4 Geo. IV., cap. 98, § 1.

kin or personal representative of the predecessor who did not stand in that relation to him at the time of his death.[1] Whether, in the case supposed, the executors of a personal representative dying before the interest in question becomes payable are entitled to a share of it, would depend on the provisions of the will under which the destination was made or the lapse occurred,—the question being, At what period of time did the will vest a transmissible interest in the beneficiaries?

At what period the resulting interest vests in cases of lapsed succession.

242. Where a fund which is the subject of a contingent destination by will or deed results to the granter's heirs *in mobilibus*, by reason of the failure of all the legatees to whom it was destined before the period of distribution, such heirs, although dying before the period of distribution, transmit a *quasi* vested interest to their executors. It may be that, in the case supposed, no right vests under the testamentary disposition until the arrival of the period of distribution. But, in the case supposed, the personal representatives do not take as legatees under the testamentary disposition; their right is derived from the Statute, and, according to it, their interest in the succession, so far as not excluded by will, vests by survivance and transmits to their representatives. Unless their interests be transmissible to representatives from the moment of the testator's death, it is not easy to see how a lapsed succession could be dealt with, and the analogy of gifts to heirs is decisive of this question.[2]

SECTION II.

Legitim (from Estate of Father or Mother).

Definition of legitim.

243. Legitim is a legal provision due to the children from the moveable succession of a father or mother. The claim is for one-third or one-half of the free estate, according as the legitim is claimed from the succession of the first deceaser, or of the survivor of the spouses. By the common law the father's estate only was subject to this claim, but in this estate there was of course included what the father had acquired *jure mariti* from his wife, if extant at his death. By the Married Women's Property Act, 1881 (44 and 45 Vict., cap. 21), section 7, it is enacted that, "After the passing of this Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scot-

[1] The authorities on this point are considered in Chapter XLII. (Bequests to Heirs and Next of Kin, &c.).

[2] See the observations on this point in *Lord* v. *Colvin*, 15 July 1865, 3 Macph. 1083, and Lord Watson's opinion in Gregory's case, 16 R. (H.L.) 13.

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land in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be." The right to legitim vests in the surviving children of either parent without confirmation, and is divisible among them equally. The shares of predeceasing children lapse. In other words, there is no right of representation in relation to legitim. Without entering on the discussion of the question what is the precise nature of the right of legitim, the right may be described as a provision to children which is incapable of being defeated by the father's will. Rights of this nature have a known place in jurisprudence, and nothing is gained by seeking to assimilate legitim and *jus relictæ* to rights of succession which depend on the will of the deceased and are postponed to all other claims, or to proper debts, which are a charge on the "whole head of the executry," including legitim. "The claim of a child for legitim is similar, in many respects, to that of a child of a marriage for provisions under an antenuptial contract,—he is a creditor among representatives, but in competing with other creditors his claim is postponed."[1] The right is so far connected with the subject of the succession that its incidence is determined by the domicile of the father.

Who are entitled to legitim.

244. Legitim is shared equally by the children of the same parent, though by different marriages.[2] A posthumous child is entitled to legitim.[3] Since the passing of the Moveable Succession Act,[4] the amount of the legitim is not liable to be diminished by the power of disposal formerly given to a wife predeceasing her husband. There is no representation in legitim; it is not due to grandchildren in their own right, but the claims of surviving children pass to their executors.[5]

Out of what subjects it is payable.

245. Legitim is payable out of the whole moveable estate of which the parent was possessed at the time of his death, including succession to which he was entitled, policies of assurance current at death, and kept up by the payment of premiums,[6] mortgages

[1] Per Lord Carriehill in *E. of Dalhousie* v. *Crokat*, 1868, 6 M. 666. See the subject discussed in *Fisher* v. *Dixon*, 16 June 1840, 2 D. 1121; and the subsequent case, 6 July 1841, 3 D. 1181, 6 April 1843, 2 Bell, 63; see also Stair, 3, 4, 24; Bankton, 3, 8, 40; Ersk. 3, 3, 15, and 30; *Robertson* v. *Kerr*, 1742, M. 8202; *Morton* v. *Young*, 11 Feb. 1813, F.C.

[2] *Chapman* v. *Gibson*, 1631, M. 8163; *Henderson* v. *Sanders*, 1634, M. 8164.

[3] *Jervey* v. *Watt*, 1762, M. 8170.

[4] 18 and 19 Vict., cap. 23, § 6.

[5] Ersk. 3, 9, 17; 1 Fraser, 543; *M'Murray* v. *M'Murray's Trs.*, 17 July 1852, 14 D. 1048.

[6] Special case *Chalmers' Trs.*, 1882, 9 R. 743. The report states that it was the "actuarial value" of such policies which entered into the estimation of legitim.

over lands in England,[1] and assignable debts, but not heirship moveables.[2] The 117th section of the Titles to Land Act, 1868 (extended to the case of real burdens by the Conveyancing Act, 1874, section 30), makes moveable the creditor's right in an ordinary heritable security, but the section contains this proviso: "That where legitim is claimed on the death of the creditor, no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim." Personal bonds bearing interest are, by the Statutes 1641, cap. 57, and 1661, cap. 32, declared to be moveable as regards executry and the rights of children, although after the elapse of the term of payment they are heritable in relation to questions between husband and wife, and consequently are not subject to *jus relictæ*. Where, therefore, moveable estate suffers a tripartite division, such bonds, if the term of payment is past, are excluded from the general scheme of division, and are separately divided in equal shares between executry and legitim.[3]

Computation of legitim.

246. The division of the father's estate falls to be made according to its condition and amount at the time of his death, irrespective of any change in the character of the succession consequent upon the acts of his executors or trustees.[4] The executors are not bound to submit to the test of a sale, and may pay the claimant of legitim the value of his share of unrealised assets as valued.[5] It results from the quality of the right that the executor cannot debit the amount of legitim with a share of losses resulting from improper investments, or from the default of a factor or man of business employed to wind up the executry estate.[6] Where payment is deferred, whether in consequence of the dependence of legal proceedings or otherwise, interest is due from the date of the

[1] *Monteith* v. *Monteith's Trs.*, 1882, 9 R. 982. Lord Young dissented, but only on the ground that in his opinion the moveable or immoveable quality of the estate ought to be determined by the law of the domicile.

[2] See, among other cases, *Lees* v. *Wilson*, 1808, Hume, 191; *Haining* v. *Young*, 1808, Hume, 214; *Breadalbane's Trs.* v. *Duchess of Buckingham*, 26 May 1842, 4 D. 1259; *M'Murray* v. *M'Murray's Trs.*, 17 July 1852, 14 D. 1048.

[3] Stair, 3, 4, 24, 4 par., and 3, 9, 22; *Anderson* v. *Mortimer*, 1682, 2 Br. Sup. 27. Under the Entail Acts an heir of entail who has made improvements may "bequeath" to a legatee the right to be made creditor in a bond charging these on the entailed estate. In such a case the right of the legatee is not subject to the claim of legitim; *E. of Kintore* v. *Lady Kintore*, 1885, 12 R. 1213. See 13 R. (H.L.) 93.

[4] *Minto* v. *Kirkpatrick*, 23 May 1833, 11 Sh. 632; *Fisher* v. *Dixon*, 16 June 1840, 2 D. 1121, and sequel, 6 July 1841, 3 D. 1181, aff. 6 April 1843, 2 Bell, 63; *Ballingall* v. *Robertson*, 1808, Hume, 214.

[5] *Gilchrist's Trs.* v. *Gilchrist*, 1889, 16 R. 1118.

[6] *E. of Dalhousie* v. *Crokat*, 1868, 6 M. 659. In this case the late Lord President was of opinion that the entrusting of the agent with unlimited authority made his acts "intromissions" of the executor, who on that ground also was responsible to the person having right to the legitim fund,—p. 670.

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father's death, and payment cannot be resisted, or the rate of interest restricted, on the ground of *mora* or lapse of time.[1] Where trustees had carried on a going business for the benefit of the general estate pursuant to the truster's directions, children afterwards electing to take legitim were held not to be entitled to trade profits in excess of the legal rate of interest;[2] but where a widow had assented to the employment of trust-funds in business, it was held that her claim resolved into a right to a share of its value when realised, whether that had been increased or diminished by the course of management assented to.[3] Policies of assurance vested in the deceased are, for the purpose of ascertaining the legitim, to be taken at their fair actuarial value.[4]

What debts fall to be deducted from the whole executry.

247. The rule, that legitim is payable out of the free estate necessarily implies that debts for which the father's personal representatives are liable fall to be deducted from the aggregate fund.[5] On the other hand, legacies and claims constituted by deed *mortis causa*, which are truly legacies in whatever form they may be expressed, are burdens upon the executry only, or dead's part.[6] Provisions to wives constituted by antenuptial contract,[7] and even postnuptial provisions, if reasonable and moderate,[8] are chargeable against the general succession. But in a case where a widow successfully claimed her legal provisions, it was held that a sum which had been paid to her for aliment and mournings for the period anterior to the next legal term after her husband's death, was not to be charged on the succession until after the amount of the legitim had been ascertained.[9] Bonds of provision to children, if delivered in the lifetime of the father, or if payable at a term which may arrive before the dissolution of the marriage, are held to be chargeable against the general succession.[10] With regard to obligatory provisions payable after the father's death, the rule

[1] *Sime* v. *Balfour*, 1804, M. "Heritable and Moveable," App. No. 3; *Hardie* v. *Kay's Trs.*, 12 Feb. 1823, 2 Sh. 187. See also *Lawson* v. *Lawson*, 1777, M. "Legitim," App. No. 1; *Menzies* v. *Livingston*, 5 July 1838, 16 Sh. 1268; *Minto* v. *Kirkpatrick*, *supra*.

[2] *M'Murray* v. *M'Murray's Trs.*, 17 July 1852, 14 D. 1048.

[3] *Ross* v. *Masson*, 3 Feb. 1843, 5 D. 483.

[4] *Pringle's Trs.* v. *Hamilton*, 1872, 10 M. 621.

[5] 1 Bell's Com. 7th ed. 678; *Gordon* v. *Meldrum*, 1628, 1 Br. Sup. 57; *Johnston* v. *Cochran*, 13 Jan. 1829, 7 Sh. 226.

[6] Stair, 3, 8, 39; Ersk. 3, 9, 16, and 22. In *Moncrieffe* v. *Monypenny*, 1713, M. 3945, a special case, it was held that the expense of a monument, ordered by the deceased to be erected to himself, was payable from the dead's part, contrary to the general rule that funeral expenses are chargeable against the general succession.

[7] Ersk. 3, 9, 22; *Johnston* v. *Cochran*, 13 Jan. 1829, 7 Sh. 226.

[8] Ersk. 3, 9, 16; *Lawrie* v. *Edmond's Trs.*, 1816, Hume, 291; and see *Andrews* v. *Sawer*, 2 March 1836, 14 Sh. 589.

[9] *Breadalbane's Trs.* v. *Duchess of Buckingham*, 26 May 1842, 4 D. 1259.

[10] Stair, 1, 5, 6; Ersk. 3, 9, 22; *Murray* v. *Murray*, 1678, M. 2372; *Fraser* v. *Bishop*, 1638, M. 3941.

appears to be the same, but the authorities are somewhat conflicting. In an early case, a bond of provision found in the granter's repositories at his death was found, contrary to the opinions of the institutional writers, to affect the whole head of his executry, and not the dead's part only;[1] and this view of the law appears to derive support from the judgments given in two more recent cases.[2] Provisions in favour of the children constituted by antenuptial contract, like provisions to wives, are chargeable against the general succession.[3] But where the marriage-contract provision is given in satisfaction of legitim, the one provision must be imputed *pro tanto* in payment of the other, which is equivalent to the extinction of the lesser obligation.[4] Funeral expenses,[5] the widow's mournings,[6] and aliment till the next term after her husband's death,[7] the expenses connected with the birth of a posthumous child,[8] and the expenses of the executors, including confirmation, inventory duty, &c.,[9] are all regarded as debts of the deceased, and are payable out of his general personal succession.

Heritable debts. Personal bonds bearing interest.

248. Where heritable debts have to be defrayed out of the moveable estate in consequence of the exhaustion of the heritable estate, they form a charge against the general succession. An exception has been admitted with reference to personal bonds bearing interest, which by Statute 1661, cap. 32, are heritable as regards the widow's claims. As the widow derives no benefit from personal bonds where the husband is the creditor, since they are subject neither to terce nor *jus relictæ*, so, where the husband is the debtor, they are not allowed as a charge against her legal pro-

[1] *M'Kay* v. *Fowler*, 1744, M. 3948.

[2] *Breadalbane* v. *M. of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377, Sup. 385; *Johnston* v. *Cochran*, 13 Jan. 1829, 7 Sh. 227. See the finding (page 233) as to Jean Cochran's provision.

[3] Ersk. 3, 9, 22; *Sandilands* v. *Sandilands*, 1671, M. 3941; *Dickson* v. *Young*, 1678, M. 3944.

[4] In the case of *Nisbet* v. *Nisbet*, 7 Mar. 1726, Robertson, 594, a father bound himself by antenuptial contract to pay certain fixed provisions to his younger children without declaring that they were to be taken in satisfaction of legitim. The House decided that the provisions should not come off the whole executry, and that they were to be imputed to legitim. The decision appears to be erroneous on both points. On the 2d, it is overruled by *M. of Breadalbane* v. *M. of Chandos*, *supra*; and its authority was denied in *Keith* v. *Keith's Trs.*, 19 D. 1057.

[5] Ersk. 3, 9, 22; *Moncrieffe* v. *Monypenny*, 1713, M. 3945; *A* v. *B*, 1708, M. 5927.

[6] Ersk. 3, 9, 22; 1 Bell's Com. 7th ed. 679; *Moncrieffe* v. *Monypenny*, *supra*; *Countess of Caithness* v. *The Earl*, 1767, M. 431; *Sheddon* v. *Gibson*, 1802, M. 11,855; *M'Intyre* v. *M'Intyre's Trs.*, *infra*.

[7] Cases of *Moncrieffe* and *Countess of Caithness*, *supra*; *Palmer* v. *Sinclair*, 27 June 1811, F.C.; *M'Intyre* v. *M'Intyre's Trs.*, 9 July 1865, 3 M. 1074.

[8] Ersk. 1, 6, 41; *Kerr* v. *Hastie*, 1671, M. 5922, and 2 Br. Sup. 576; *Muirhead's Relict* v. *Her Father-in-law*, 1706, M. 5927.

[9] *Moncrieffe* v. *Monypenny*, *supra*; *Breadalbane's Trs.* v. *Duchess of Buckingham*, 23 May 1842, 4 D. 1259.

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visions.[1] Prior to the term of payment personal bonds are payable out of the general succession, and therefore tend to diminish the amount of the legitim and the *jus relictæ*.

Deeds *inter vivos* affect the legitim fund.

249. Legitim, being a legal provision, cannot be excluded or diminished by the father's will or testamentary disposition. How it may be satisfied or discharged by express contract or equivalent provisions in the children's favour will be considered hereafter.[2] But as the fund from which legitim is payable is simply the free moveable succession accruing at the father's death, it follows that the legitim fund is diminished by *bona fide* alienations *inter vivos*, and by conversions of moveable estate into heritable during the father's lifetime.[3] The legitim fund is therefore effectually diminished by deeds of alienation or conversion executed *inter vivos* and in *liege poustie*, provided they are absolute and irrevocable, and are not intended as a mere device for diminishing the children's legal provisions. The operation of these rules will be best understood by an examination of the decided cases on the subject.

Secus, as to trust-assignations to the prejudice of children's claims.

250. In the case of *Lashley* v. *Hog*,[4] a leading case in this branch of the law, the father, for the purpose of defeating the legitim, transferred to a trustee, shortly before his death, certain shares of the stock of the Bank of Scotland, upon trust, that the proceeds should be laid out in the purchase of land destined to a certain series of heirs. After his death the question arose, whether the purposes of the assignation were not truly testamentary? The Court of Session, on a proof, found that the assignation was absolute and irrevocable; but the House of Lords, taking a different view of the facts, directed that all such shares standing in name of the disponee, "under any agreement or understanding that he would invest the same in land after the death of the said Roger Hog (the father), and also all such shares, the dividends whereof shall appear, notwithstanding the transfer of the same, to have been after such transfer ordinarily received for the account of, and applied for the use of, the said Roger Hog, ought to be considered as subject to the pursuer's claim of legitim."[5] In the case of *Nicolson's Assignee* v. *Hunter*,[6] the same question arose with reference to an assignation of personal estate in favour of trustees, upon trust, in the first place, for the payment of the truster's debts and a pro-

[1] Stair, 3, 4, 24; Ersk. 3, 9, 22; *Mackenzie* v. *Robertson*, 1668, M. 5784; *Ross* v. *Graham*, 14 Nov. 1816, F.C.; *Ramsay* v. *Goldie*, 23 June 1825, 4 Sh. 110.

[2] *Infra*, Chapter VII.

[3] Ersk. 3, 9, 16; *Black* v. *Black*, 1795, Hume, 290; *Hay* v. *Angus*, 1795, Hume, 281; *Lashley* v. *Hog*, 1800, M. "Legitim," App. No. 2; 12 July 1804, 4 Pat. 581.

[4] *Lashley* v. *Hog*, *supra*.

[5] 4 Pat. 647. See the opinion of Lord Moncreiff in a cognate case, *Buchanan* v. *Buchanan*, 1876, 3 R. 556 at 558.

[6] *Nicolson's Assignee* v. *Hunter*, 2 Mar. 1841, 3 D. 675.

vision to himself during his life, and secondly, for payment of legacies, the residue to be applied in the purchase of land to be entailed on certain heirs. The Court held the first purpose of the deed to be a proper alienation *inter vivos*, but were of opinion that the ulterior purposes were testamentary, and therefore ineffectual to exclude the claim of legitim.

Implied trusts to the prejudice of the legitim.

251. In a case where promissory notes were given over in the lifetime of the granter to a trustee for behoof of the truster's grandchildren, and the trustee admitted on examination that he was bound to redeliver the renewal note upon demand, it was held that the purpose of the deposit was testamentary, and that the fund was subject to *jus relictæ* and legitim.[1] In a subsequent case, where a personal bond was taken payable to the grandsons of the creditor, under reservation of his own liferent interest, and the deed was delivered to a trustee for their behoof, the claim of legitim was disallowed, in respect that it was proved by parole evidence that the transaction was irrevocable. The Court were of opinion that the reservation of a liferent was not conclusive as to the testamentary character of the provision. In one view it rather confirmed the inference as to the intention to vest the fee irrevocably, because, if the understanding were that the fund was still to be under the command of the granter, the reservation of a liferent was unnecessary.[2] In order to constitute an irrevocable trust, to take effect after the granter's death, it is of course essential that the deed or property should be delivered to the trustee, and therefore, where delivery has not been made in the father's lifetime, the claim of legitim will not be barred.[3] In cases where fiduciary assignations have been admitted as effectual to exclude the legitim, much importance has been attached to the fact of delivery as evidence of intention to place the fund out of the control of the granter.[4]

Legitim not affected by will or testamentary instruments.

252. The rule requiring that the deed must be irrevocable in order to bar the claim of legitim, is plainly exclusive of all testamentary writings and *mortis causa* conveyances, such deeds being in their nature ambulatory and revocable. Indeed it is implied in the definition of legitim, as a legal provision, that it is not defeasible by will, and it is unnecessary to cite authority for the proposition

[1] *Milroy* v. *Milroy*, 1803, Hume, 285.

[2] *Collie* v. *Pirie's Trs.*, 22 Jan. 1851, 13 D. 506; and see *Agnew* v. *Agnew*, 1775, M. 8210.

[3] *Craigie* v. *Craigie*, 1811, Hume, 288. Putting the assignation upon record is not equivalent to delivery,—*Millie* v. *Millie*, 1803, M. 8215; 18 March 1807, 5 Pat. 160; *M'Donald* v. *M'Donald*, 1808, Hume, 288.

[4] *Black* v. *Black*, 1795, Hume, 290; *Hay* v. *Angus*, 1795, Hume, 281. Notwithstanding the criticisms of Professor More (Notes, 353) upon this and the case of *Agnew*, last cited, it must now be held as settled law that an irrevocable assignation of personal estate *inter vivos*, although qualified by the reservation of the granter's liferent, takes the subject out of the legitim fund.

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that legacies affect only the executry. We have already seen that the circumstance of the term of payment being postponed until after the father's death is not of itself sufficient to defeat the claim of the grantee under an irrevocable and delivered deed, though it is a circumstance unfavourable to the claim.[1]

Quære as to deeds *inter vivos* when executed *in lecto.*

253. The objection of deathbed is now taken away by Statute,[2] so far as relates to alienations by "deeds, instruments, or writings," but it has been questioned whether the Act of Parliament will cover the case of a gift made on deathbed, without the use of writing, for the purpose of defeating legitim.[3] It is laid down by the institutional writers,[4] and the proposition is recognised in the decisions, that gifts made or executed on deathbed are ineffectual to withdraw the subject from the father's succession, so that the property shall not be subject to legitim and *jus relictæ*. In many of the cases the deeds to which exception was taken were manifestly testamentary in their conception and effect,[5] and in such cases the grounds of objection are so closely related that it would be difficult to point to one in which the conveyance was held ineffectual to exclude legitim upon no other ground than that it was executed within sixty days of death.[6] Of the cases in which effect was given to the objection of deathbed, some relate to simple assignations of moveable subjects and debts.[7] Others relate to discharges of debts and advances.[8] Donations on deathbed, by delivery of cash or moveable effects, have uniformly been held insufficient to defeat the rights of children claiming legitim.[9] In the opinion of Baron Hume, as cited by Lord Fraser, a father would not be entitled on deathbed to exclude his children from legitim by converting his estate from moveable to heritable,—*e.g.*, by changing bills or promissory notes into heritable bonds.[10] Deeds of conversion of herit-

[1] See, in addition to the cases already cited on this point, *Thomson* v. *Thin*, 1675, M. 3593; *Grant* v. *Grant*, 1679, M. 3596; *Sorlies* v. *Robertson*, 1771, M. 5947; *Burden* v. *Smith*, Elch. "Mutual Contract," No. 7; 27 April 1738, 1 Cr. St. & Pat. 214; *Hog* v. *Lashley*, M. 8193, 7 May 1792, 3 Pat. 247.

[2] 34 and 35 Vict., cap. 81.

[3] *Hay* v. *Coutts' Trs.*, 1890, 18 R. 244.

[4] Stair, 3, 4, 24; Bankton, 3, 8, 15; Ersk. 3, 9, 16.

[5] See, for example, the case of *Burden* v. *Smith*, 27 April 1738, as reported by Cr. St. & Pat. 214, and *Hog* v. *Lashley*, 3 Pat. 247.

[6] See an early case, *Goodall* v. *Livingston*, 1681, M. 8176, where a child claiming legitim was found to have a title, without confirmation, to pursue a reduction of a deathbed deed granted in prejudice of his rights.

[7] Stair, 3, 4, 24, citing *Ramsay* v. *Pyrie*; *Aikman* v. *Boyd*, 1679, M. 3201; *Milroy* v. *Milroy*, 1803, Hume, 285; and see *Cant* v. *Edgar*, a case on an assignation of a right to relief, 1628, M. 3199.

[8] *Grant* v. *Gunn's Trs.*, 28 Feb. 1833, 11 Sh. 484; *Allan* v. *Allan*, 1763, 5 Br. Sup. 897, where it was held that a child who had discharged his legitim could not be reponed on deathbed.

[9] *Brown* v. *Thomson*, 1634, M. 3200; *Milroy* v. *Milroy*, 1803, Hume, 285.

[10] 2 Fraser, 2d ed., p. 1008, citing Hume's MS. Lectures, and *Henderson* v. *Saughtonhall*, 1683, M. 3202.

able estate into moveable were held reducible *ex capite lecti*,[1] so that in a case of a sale the price might be successfully claimed by the heir-at-law ;[2] and if we admit that the interests of children entitled to legitim are protected against gratuitous alienations on deathbed, there can be little doubt that a conversion of moveable into heritable property is open to exception as a virtual conveyance.

Doctrine as to conveyances *in fraudem* of the legitim criticised.

254. It has been said that alienations by a father, made with the design of defrauding his children of the legitim, are ineffectual. Such a fraud could only be inferred from the nature of the transaction, since the purpose which the granter had in view is not in itself criminal or immoral. A deed of alienation executed in *liege poustie*, and conceived in such terms as to give an indefeasible right to the disponees, could not be set aside merely because the granter had intended to take the subject out of his moveable succession. An examination of the authorities usually cited in support of the doctrine of alienation in defraud of legitim will show that the proposition contended for is nothing more than a statement in a different form of the rule, according to which testamentary deeds simulating the forms of absolute transfers are reducible at the instance of children claiming legitim. Such is in substance the conclusion at which Professor Bell and Lord Fraser arrived in their examination of this branch of the subject, and to their observations the reader is referred.[3].

Legitim cannot be restricted or modified by the father's act.

255. In closing this subject, it may be observed that a father has not the power of restricting the legitim of a child to a liferent, or limiting the destination of the legitim in any way,[4] not even for reasonable cause, such as the bankruptcy,[5] incapacity,[6] or misbehaviour[7] of the child. The power of doing so, desirable as it is in some cases, can only be obtained by the exclusion of the right to legitim in the father's antenuptial contract, or by a subsequent discharge of the claim.

Vesting of the right to legitim.

256. Legitim vests at common law by survivance of the father.[8]

[1] Ersk. 3, 8, 98 ; 1 Bell, Com. 7th ed. 87.

[2] *Gillespie* v. *Gillespie*, 1802, Hume 145.

[3] 2 Fraser, 2d ed. 1008 ; Bell, Pr. § 1584 ; also *Bousted* v. *Gardner*, 1879, 7 R. 139, where the averment that a business was transferred from a father to a son *in fraudem* of the legitim (claimed by a daughter) was held insufficient to support an action, Lord Moncreiff observing, —"If this only means that the object of the minutes of agreement was to divest the father of his moveable estate in his lifetime in order to defeat legitim, it is irrelevant."

[4] *Christie* v. *Christie*, 1681, M. 8197 ; *Robertson* v. *Kerr*, 1742, M. 8202.

[5] *Allan* v. *Callander*, 1762, M. 8208.

[6] *Morton* v. *Young*, 11 Feb. 1813, F.C.

[7] *Anderson* v. *Miller*, 1799, Hume, 282.

[8] Stair, 3, 8, 50 ; Ersk. 3, 9, 30 ; 1 Bell, Com. 7th ed. 137 ; *Yeaman* v. *Yeaman*, 1686, M. 8176 ; *Russell* v. *Brown*, 1687, M. 8177 ; *Jervey* v. *Watt*, 1762, M. 8170 ; and cases cited in immediate sequence. The right vests *a morte* although payment should be postponed in consequence of the father having given a liferent of his whole estate to his widow by antenuptial contract.

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It was suggested by more than one high authority that the right must in some way be claimed from the executors in order to its constitution,[1] but this view is abandoned. Accordingly, where all the children of a family of daughters except one died in minority and without claiming legitim, the survivor successfully claimed the whole legitim fund,—that is, one share in her own right, and the remainder as the representative of her deceased sisters.[2] A husband is entitled to claim legitim accruing to his wife with her concurrence, if she has no adverse interest; but where she has the option of taking a conventional provision, as to which her husband's rights are excluded, the privilege of election has been considered to be personal, yet so that the husband must be a consenting party.[3] A claimant of legitim may confirm as an executor-creditor if there be no other executor of the father confirmed.[4] If there is an executor he may be sued for legitim in his representative character.[5]

SECTION III.

Of Jus Relictæ.

Definition of the right.

257. *Jus relictæ* is a legal provision accruing to the widow of a person dying domiciled in Scotland[6] out of his moveable or personal succession, wherever situated,[7] amounting to one-third of the free succession where there are children surviving the dissolution of the marriage, and to one-half where there are no surviving children.[8] The right vests by survivance;[9] and it is independent of the husband's testamentary provisions,[10] though, like legitim, it may be renounced by contract, or satisfied by

[1] *Dicta* in *Stewart's Trs.* v. *Stewart*, 20 Dec. 1851, 14 D. 298.

[2] *M'Murray* v. *M'Murray*, 17 July 1852, 14 D. 1048. See particularly Lord Rutherfurd's note.

[3] *Macdougal* v. *Wilson*, 20 Feb. 1858, 20 D. 658. So found in a case subsequent to the Married Women's Property Act, 1881. The subject of Election is elsewhere considered.

[4] Ersk. 3, 9, 30; 1 Fraser, 546.

[5] *Goodall* v. *Livingston*, 1681, M. 8176. In one of the cases an action brought to recover legitim after the elapse of twenty years from the date of vesting, was held not to be barred by *mora*; *Gourlay* v. *Wright*, 23 June 1864, 2 M. 1284.

[6] *Nisbet* v. *Nisbet's Trs.*, 24 Feb. 1835, 13 Sh. 517; *supra*, § 243. On the subject of *jus relictæ* generally, see Ersk. 3, 9, 15, and 21; 1 Bell, Com. 7th ed. 678.

[7] *Breadalbane Trs.* v. *Breadalbane*, 11 March 1843, 15 Jur. 389.

[8] Erskine and Bell, *ut supra*. Under the old law this provision was not due in the case of the dissolution of the marriage within a year and day without the birth of a living or viable child. In successions accruing since 25th May 1855, the date of the Moveable Succession Act (18 Vict., cap. 23), the rule is as stated in the text.

[9] Stair, 3, 8, 50; Ersk. 3, 9, 30; 1 Bell, Com. 137; *M'Aulay* v. *Bell*, 1712, M. 3848.

[10] This is implied in the definition of *jus relictæ* as a provision due *ex lege*. If it were liable to be defeated by will, it would not be a legal provision, but strictly a share of intestate succession.

equivalent provisions. The effect of the renunciation or satisfaction of *jus relictæ* is considered in a subsequent chapter.[1]

Subject to usual deductions from the whole executry.

258. It has been pointed out that legitim and *jus relictæ* are so far of the nature of rights of succession that they are only payable out of the free estate after deducting debts,[2] expenses of administration,[3] and rational provisions[4] for which the deceased had become bound by deed *inter vivos*.[5] These charges being provided for out of the first of the personal estate, the remainder constitutes the free succession, and is subject to a triparite division if legitim and *jus relictæ* are both due, or to a bipartite division if only one of these rights has accrued.

Diminution of *jus relictæ* by husband's deeds *inter vivos*.

259. The amount of the prospective succession is liable to be diminished by the alienation of the husband's moveable estate in his lifetime, or by its conversion into heritage.[6] The wife, though vested by a legal fiction with a common interest in her husband's personal estate, has no power to control him in the exercise of his right of disposing of it. Deeds executed on deathbed,[7] as well as gratuitous alienations which are either undelivered or revocable by the grantee,[8] may be set aside by the widow in so far as her claims are thereby prejudiced or their amount lessened. These points have been fully considered in treating of legitim; and as the rights of legitim and *jus relictæ* may now be regarded as completely assimilated, it is unnecessary to resume the discussion of the subject.[9] In the case of *Muirhead* v. *Lindsay*,[10] it was held that sums due under policies of assurance effected by a husband on his life were subject to *jus relictæ*,—distinguishing the case

[1] *Infra*, Chapter VII.

[2] That is, debts for which the executry estate is liable either primarily or by reason of the insufficiency of the heritable estate,—Ersk. 3, 9, 22; *Raith* v. *Meldrum*, 1628, 1 Br. Sup. 57; *Johnston* v. *Cochrane*, 13 Jan. 1829, 7 Sh. 226.

[3] *Moncrieffe* v. *Monypenny*, 1713, M. 3945; *Breadalbane Trs.* v. *Buckingham*, 26 May 1842, 4 D. 1259.

[4] *Murray* v. *Murray*, 1678, M. 2372; *Fraser* v. *Bishop*, 1638, M. 3941; *M'Kay* v. *Fowler*, 1744, M. 3948; *Breadalbane Trs.* v. *Buckingham*, 11 Mar. 1843, 15 Jur. 389 (cases on Bonds of Provision). *Sandilands* v. *Sandilands*, 1671, M. 3941; *Dickson* v. *Young*, 1678, M. 3944 (cases on Antenuptial Contract Provisions). Also *Anderson* v. *Miller*, 1799, Hume, 282.

[5] See this more fully explained, *supra*, § 247.

[6] See *Agnew* v. *Agnew*, 1775, M. 8210; *Lady Balmain* v. *Graham*, 1721, M. 8199; and cases reported by Hume, *voce* "Legitim."

[7] *Hog* v. *Lashley*, 7 May 1792, 3 Pat. 247; *Milroy* v. *Milroy*, 1803, Hume, 285.

[8] *Millie* v. *Millie*, 18 Mar. 1807, 5 Pat. 160; *Hog* v. *Hog or Lashley*, as reversed, 12 July 1804, 4 Pat. 581; and cases cited in Section II., *supra*.

[9] The complete identity of the principles which regulate the legal rights of the widow and children will be better seen when we come to treat of the Satisfaction and Discharge of these rights. The law of legitim may be said to govern *jus relictæ*, although there are some peculiarities of the former, arising from its being a fund divisible among several objects, which have no counterpart in the law of *jus relictæ*.

[10] *Muirhead* v. *Lindsay*, 6 Dec. 1867. See *Wight* v. *Brown*, 11 D. 459; see *Muirhead* v. *Lindsay*, 1867, 6 M. 95.

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from *Wight* v. *Brown*, where the claim was at the instance of the wife's executors. Lord Deas intimated a doubt whether the latter case was well decided.

Vesting of *jus relictæ*.

260. *Jus relictæ* vests by survivance, and entitles the widow to apply for confirmation as executrix *qua* relict, if the executors-nominate or next of kin should fail to make up a title. Reference is made to the observations on the vesting of legitim in the preceding section of this chapter.[1]

SECTION IV.

Husband's Interest in Wife's Succession (Jus Relicti).

261. The enactment is in these terms (44 and 45 Vict., cap. 21, section 6): "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be." There are three decisions relating to this section. In the case of *Paterson* v. *Poë*,[2] it was held by the House of Lords, affirming the decision of the Court of Session, that the 6th section applies to marriages contracted before as well as after the passing of the Act. In the next case, *Fotheringham's Trustees*,[3] the Lord President Inglis pointed out that the application of the section to antecedent marriages is necessarily limited to cases of estate from which the *jus mariti* is excluded, and in which the wife has an immediate or eventual absolute interest. In that case all the purposes of the wife's settlement had failed, and the husband's claim under the Statute was sustained. Attention was directed in this case, and also in *Simons*,[4] to the terms of the section which import into the right conferred on the husband the whole law of *jus relictæ*, including the rules of law in relation to satisfaction or discharge of the provision. At the time of printing this sheet, a case (*Buntine*) is depending before the First Division on the question whether a husband who had taken a liferent of his wife's estate could also make a claim under the Statute.

[1] Interest is due on *jus relictæ* from the date of the husband's death, where the estate is productively invested; *M'Intyre* v. *M'Intyre's Trs.*, 9 July 1865, 3 M. 1074.

[2] *Paterson* v. *Poë*, July 16, 1883, 10 R. (H.L.) 73, affirming 10 R. 356.

[3] Special Case *Fotheringham's Trs.*, 1889, 16 R. 873.

[4] Sp. Ca. *Simons' Tr.*, 1890, 18 R. 135.

CHAPTER VII.

EXCLUSION OF LEGAL CLAIMS BY WILL OR CONTRACT.

1. Satisfaction and Discharge of Legitim.
2. Satisfaction of Claims on the Heritable Estate and Executry.
3. Satisfaction and Discharge of Jus Relictæ.
4. Satisfaction of Terce and Courtesy.

262. This chapter is concerned with the investigation of questions of a higher order of complexity than those which have hitherto engaged our attention. The subjects embraced in it might be treated either in their relations to intestacy, or as a branch of the law of testamentary succession, according to the point of view chosen. But no exposition of the law of intestate succession would be complete which did not include in some form a discussion of the exclusion of the legal claims of the defunct's widow and children by will, contract, or antenuptial deed.

Satisfaction and Discharge distinguished.

263. The exclusion of legal claims is effected in two different modes, which it is necessary carefully to distinguish, and which are termed Satisfaction and Discharge. A legal claim is said to be satisfied when a testamentary provision is given in place of it, the renunciation of the legal claim being made a condition of the gift. In this case the legatee has the right of election between the legal claim and the conventional provision. A legal claim is said to be discharged when it is excluded by the antenuptial contract of the father, or is discharged by the act of the child.

SECTION I.

Satisfaction and Discharge of Legitim.

Importance of the doctrine of satisfaction in relation to legitim.

264. The subject of legitim may be first considered, because the rules which regulate the discharge and satisfaction of that interest are well understood and ascertained. A clear perception of the operation of the doctrine of satisfaction of legitim will simplify the exposition of the principle as applied to *jus relictæ*, terce, courtesy, executry, and inheritance.

265. The right of the individual member of a family may be

CHAPTER VII.

How legitim may be discharged or satisfied.

extinguished in various ways: (1) It may be expressly discharged by the declaration of his parents in their antenuptial contract, or by his own deed; (2) it may be satisfied by acceptance of a testamentary provision declared to be given in place of legitim, or by acceptance of a provision under a general settlement which disposes of the legitim fund; (3) it may be extinguished wholly or partially when the claimant, being heir-at-law to his father, succeeds to the heritable estate, in consequence of the younger children's right to require the heir to collate; or lastly, (4) it may be satisfied or compensated by advances made to the claimant by the father in his lifetime, which are imputed to account of legitim by the operation of the doctrine of *collatio bonorum inter liberos.*

Express discharge where the father has married without a contract.

266. (1.) With respect to discharges by deed; in practice, express discharges of legitim only occur in marriage-contracts. Unless in cases where the father has married without a contract, there is no necessity for a personal discharge, as antenuptial contracts invariably exclude the legitim, and such an exclusion is held to be equivalent to an onerous discharge of the right, provided a sum, however small, is given in place of it.[1] The exclusion ought to be made applicable in express terms to the person as well as to the right. The word legitim is the most proper to denote the right, though "portion-natural" and "bairn's part," which are associated with it in the ordinary style of marriage-contracts, would probably be held sufficiently expressive of the intention.[2] Since the decision in the case of *Keith's Trustees,*[3] it may be assumed that "children of the marriage" is the expression most properly descriptive of the persons, where the intention is to exclude the heir as well as the younger children.[4]

Discharge by antenuptial contract disposing of the entire succession.

267. Further, an antenuptial contract has the effect of constructively discharging the legitim, when by its provisions the *universitas* of the parents' moveable estate is settled upon the children of the marriage absolutely or subject to a power of division, express or implied;[5] or upon the wife in liferent and the children of the marriage in fee,[6] or even upon the wife in fee-simple; for until

[1] Ersk. 3, 9, 23; Bankton, vol. ii. p. 303; Bell, Pr. § 1587; *Maitland* v. *Maitland,* 14 Dec. 1843, 6 D. 244.

[2] *Breadalbane Trs.* v. *Marchioness of Chandos,* 16 Aug. 1836, 2 S. & M'L. 377, affirming 14 Sh. 309.

[3] *Keith's Trs.* v. *Keith,* 19 D. 1040; see also *Maitland* v. *Maitland, supra.*

[4] It is a serious mistake, and one that has occasioned great hardship to families, to exclude the legitim of the *younger* children only. The effect of this mistake is to give the heir an indefeasible right to one-third of the moveable succession; see *Panmure* v. *Crokat,* 22 Nov. 1854, 17 D. 85., cited *infra,* p. 138.

[5] *Home* v. *Watson,* 1757, 5 Br. Sup. 330, overruling the principle laid down in *Stirling* v. *Luke,* 1732, 1 Cr. & St. 215, and *Burden* v. *Smith,* 1738, 1 Cr. St. & P. 214.

[6] *Fisher's Trs.* v. *Fisher,* 19 Nov. 1844, 7 D. 129. See *Lawrie* v. *Edmond's Trs.,* Hume, 291.

marriage every man has the uncontrolled power of disposition of his whole fortune, and if he settle it all upon his intended wife by an *onerous* act—which an antenuptial provision to the wife is—there remains no free fund from which legitim can be claimed.[1] But it is not enough to exclude the claim of legitim that the father in his antenuptial contract or settlement on marriage provides an adequate sum to the children of the marriage payable at his death. However ample such provision may be, it has no higher effect than that of putting the child to his election between the conventional provision and the claim of legitim.[2] Accordingly, where a Scotsman, by indenture or settlement on marriage in the English form, provided a sum of £6000 to be held by trustees in trust for the children of the marriage, but did not declare the provision to be in satisfaction of legal claims, an averment that by the law of England this indenture "operated as a full discharge of all legal or other claims which the issue so provided for could prefer against the succession of their parents, or in respect of the death of either of them," was held not to be a relevant answer to a claim of legitim, and it was ordered that an account be taken of the free moveable estate, so that the amount of the legitim fund should be ascertained.[3] Legitim, it is scarcely necessary to add, cannot be extinguished or diminished by a bequest, *mortis causa* donation, or trust conveyance of the estate to another child, or to a stranger.[4]

Discharge when parent becomes a party to the child's marriage-contract.

268. Express discharge by the child occurs in practice when a parent, who has not discharged his children's legitim on the occasion of his own marriage, becomes a party to the marriage-contract of one of his children as granter of a provision,—which may either be in the form of a present payment or of an obligation to pay,—and declares that the provision is to be taken in satisfaction of legitim. The acceptance of the provision is sufficiently signified by the child's subscription of the contract, which is in effect a discharge of the right to legitim. As already observed, a discharge of the legitim is not to be implied,[5]—a rule which is illustrated by one of the points in the Breadalbane succession case. One of the daughters of the Marquis, by her marriage settlement in the English form, had accepted a sum secured to her "as her *portion* or

[1] *Per curiam* in *Fisher's Trs.*, *supra*. A *partial* settlement of the conquest by antenuptial contract upon the children of the marriage does not of course imply an exclusion of legitim as to the remainder; see *Nisbet* v. *Nisbet*, 1726, Robertson, 594.

[2] Cases of *Keith*, *Breadalbane*, and *Trevelyan*; *Rait* v. *Arbuthnott*, 1892, 19 R. 687.

[3] *Treveleyan* v. *Trevelyan*, 1873, 11 M. 516. See also *Somerville's Trs.* v. *Dickson's Trs.*, 1887, 14 R. 770, which however, is really a decision applying a *res judicata*.

[4] *Lashley* v. *Hog*, 12 July 1804, 4 Paton, 581 (5th point); see Lord Eldon's speech, reported at great length, p. 663.

[5] Stair, 3, 8, 45; Ersk. 3, 9, 23; *Clark* v. *Burns*, 27 Jan. 1835, 15 Sh. 326, and cases there cited; *Breadalbane* case, *infra*.

fortune." This was maintained to be equivalent to a discharge of the legitim; but it was held by the Court of Session, and the House of Lords on appeal, that the right to the *portio legitima* was not discharged by a form of expression in which the significant part of the legal term was wanting.[1]

Omission to discharge the rights of the heir.

269. The law of legitim in its collisions with the clauses of style by which conveyancers have sought to exclude or restrict its operation, has been productive of surprises, of which the most notable have resulted from the omission on the part of the conveyancer to take notice of the rights of the heir. Two cases of this description may be cited as deserving of study. The first is the case of *Lord Panmure* v. *Crokat*.[2] Lord Panmure's father, in his antenuptial contract, had made certain provisions for the younger children of the marriage, subject to the usual declaration that these were given in satisfaction of legitim. By his will he left the residue of his estate to strangers in blood. The heir, who took no benefit under the contract of marriage, and whose claims were not included by it in words, successfully claimed his legitim, and carried off one-half of the personal estate. If the younger children had been the residuary legatees, the heir could have gained only a formal advantage by this claim, because the entailed estates,—or rather the life interest of the heir—which was of much greater value than the legitim fund, would have been subject to collation. But as the younger children were not interested in the residue, a question of collation could not arise. A similar result was deduced in the *Kintore* case,[3] the facts being different in this respect, that Lord Kintore's antenuptial contract, which burdened the heir with provisions in favour of the younger children, went on to declare, "which provisions before conceived in favour of the children of this marriage are hereby declared to be in full satisfaction to them" of legitim and executry. It was held by the First Division, and the judgment was affirmed on appeal, that the exclusion only applied in terms and in intention to the claims of legitim of those children in whose favour provisions were "conceived," their Lordships reserving their opinions on the question whether it was possible to exclude the legitim of the heir without giving him a provision or benefit in exchange.[4]

[1] *Breadalbane's Trs.* v. *Marchioness of Chandos*, 14 Sh. 309, 16 Aug. 1836, 2 S. & M'L. 377, overruling the early case of *Nisbet* v. *Nisbet*, 1726, Robertson, 594, as to which see Lord Colonsay's remarks, 19 D. 1057. See also as to exclusion of legitim in the father's lifetime, *Smith* v. *Elleis*, 1622, M. 4777.

[2] *Panmure* v *Crokat*, 1854, 17 D. 85.

[3] *Lady Kintore* v. *E. of Kintore*, 1884, 11 R. 1013; affd. 12 R. (H.L.) 93.

[4] See Lord Fraser's opinion on this point, 11 R. at p. 1019, and remarks of L. Pr. Inglis at p. 1029.

Exclusion of the legitim by election to take under a will.

270. (2.) The exclusion of the right of legitim by antenuptial contract, or by discharge executed in the lifetime of the father, is sometimes termed "forisfamiliation." In either case it operates in favour of the other children of the marriage whose right to legitim has not been excluded,[1] in the same way as if the child had died during the lifetime of the father, and therefore before the right vested.[2] Where, on the other hand, the right to a share of legitim is forfeited in consequence of the child electing to take his provisions under a testamentary deed which disposes of the legitim, the benefit of the share, which, if claimed, must have come out of the residuary estate, enures to the benefit of that estate.[3] The principle of the distinction was thus stated by the Lord President M'Neill :[4] "When the father, by transaction in his lifetime, extinguishes the claim for legitim which his child would, in the event of survivance, have been entitled to make against the succession, the effect of that transaction is *to relieve the succession* from the eventual claim of that child, just as if the child had died, or been forisfamiliated. That relief to the succession is what the father acquires by the transaction ; but the succession so relieved becomes, on the death of the father, subject to the operation of the law, and must undergo the division which the law has appointed in regard to the moveable estate and succession of every man. Whereas, when no transaction binding on the child has taken place during the father's lifetime, and when by the father's death the right to legitim has opened to and become fully vested in the child, and such child agrees to take in lieu thereof a provision which the father had put in his option,—that is a transaction, not with the father, but with the representatives, who in that way satisfy the claim, and are entitled to the benefit of the relief so obtained." If the legitim of all the children is discharged in the lifetime of the parent, the legitim fund is extinguished, and the succession is then divisible equally between the widow and the next of kin.

Acceptance of provision under a total settlement equivalent to election.

271. The doctrine that the acceptance of a provision under a settlement which disposes of the testator's whole moveable estate operates in satisfaction of legitim, is now so well established, that it is unnecessary to refer circumstantially to the cases.[5] A total

[1] *Hog* v. *Lashley*, 7 May 1792, 3 Paton, 247, where the legitim was discharged by the children in consideration of an immediate payment ; and *Lord Panmure* v. *Crokat*, 29 Feb. 1856, 18 D. 703, where it was excluded by antenuptial contract in consideration of provisions payable after the father's death.

[2] That the right to legitim vests by survivance was authoritatively fixed by *M'Murray* v. *M'Murray's Trs.*, 17 July 1852, 14 D. 1048, and *Macdougall* v. *Wilson*, 20 Feb. 1858, 20 D. 658.

[3] *Fisher's Trs.* v. *Dixon*, 6 Apr. 1843, 2 Bell, 63, affg. 2 D. 1121.

[4] 18 D. 709.

[5] See the following cases, among many others, which illustrate the principle :— *Breadalbane Trs.* v. *Duchess of Buckingham*, 5 Mar. 1840, 2 D. 731 ; *Nicol-*

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settlement is in effect a disposition of the legitim, and the legatee must therefore elect between his rights under the settlement and his legal claims. As to the effect of the assertion of a claim of legitim adversely to a testamentary instrument on the rights of other beneficiaries, reference is made to the subsequent chapter on ELECTION.[1]

Appointment of a universal legatee does not affect legitim or *jus relictæ*.

272. It has, however, been represented by high authority that the acceptance of a legacy or special provision under a partial settlement of moveable estate does not preclude the legatee from claiming his legitim.[2] In the case of *White* v. *Finlay*,[3] where the father of a family appointed his widow "sole executrix and universal legatee," it was ruled by a unanimous judgment of the Second Division that the testament, although operative as a conveyance of the entire *legal estate* for the purposes of administration, disposed of the *beneficial* interest in the dead's part alone; insomuch that the children, after executing a ratification of the testament, were entitled to legitim in competition with the trustee on the executrix's estate. It follows, therefore, that where a universal legacy of the moveable estate is given to one child, under burden of provisions to the other children, legitim may be claimed by the general legatees in addition to their provisions. A provision of heritage will not be presumed to be in satisfaction of legitim.[4]

Compensation of claim of legitim by means of collation.

273. (3.) The right to legitim may also be extinguished or compensated where the other children meet the claim by the counter claim of "collation," directed either against the heritable estate to which the child sustaining the character of heir-at-law has succeeded, or against moveable funds advanced to the child by the parent during his lifetime. The reader is reminded that the principle of collation as between heir and executor extends to property to which the heir has succeeded by a singular title, *e.g.*, an

Compensation by collation between heir and executor.

son's Assig. v. *Macalister's Trs.*, 2 Mar. 1841, 3 D. 675; *Minto* v. *Kirkpatrick*, 20 May 1842, 4 D. 1224; *Jack* v. *Marshall*, 1879, 6 R. 543; *Wilson's Trs.* v. *Wilson*, 1 July 1843, 15 Scot. Jur. 549; *Collier* v. *Collier*, 6 July 1833, 11 Sh. 913, and F.C.; *Henderson* v. *Henderson*, 1782, M. 8191.

[1] Chapter XII.

[2] *Collier* v. *Collier*, *ut supra*, per Lord Glenlee; *Howden* v. *Crighton*, *infra*, and see remarks in note to report of *Collier's* case; *Henderson* v. *Henderson*, *ut supra*, decree.

[3] *White* v. *Finlay*, 15 Nov. 1861, 24 D. 38.

[4] *Howden* v. *Crighton*, 18 May 1821, 1 Sh. 18, N.E. 16; *Marshall* v. *Marshall's Trs.*, 21 Nov. 1829, 8 Sh. 110. On the subject of the satisfaction of legitim by testamentary provisions, and by payments after the father's death, reference is also made to the cases of *Ross* v. *Mackenzie*, 18 Nov. 1842, 5 D. 151; *Paterson* v. *Moncrieff*, 15 May 1866, 4 Macph. 707 (as to Discharge in ignorance of the Right); *Stevenson* v. *Hamilton*, 7 Dec. 1838, 1 D. 181, and *Lowson* v. *Young*, 15 July 1854, 16 D. 1098 (as to Election); *Gourlay* v. *Wright*, 23 June 1864, 2 Macph. 1284 (*mora* pleaded as a defence to the claim); and *M'Murray* v. *M'Murray's Trs.*, 14 D. 1048 (as to Homologation and Personal Bar).

entailed estate, provided he is heir *alioqui successurus*.[1] That it operates practically in the way of compensation, is evident from the import of the two leading modern cases, *Anstruther* v. *Anstruther*, and *Fisher's Trustees* v. *Fisher*.[2] In the former case, the heir, who succeeded to the estate in virtue of an entail executed by an ancestor of his father, could not lawfully convey the fee to the younger children; nevertheless *they* were held entitled to impute the value of his life interest in the estate in extinction of his share of the total succession. In the latter case, it was expressly found that the heir was not bound to execute a *pro indiviso* conveyance of the heritable estate in favour of the family; but that it was competent and sufficient to have the value of the estate ascertained, with the view of imputing it in part payment of the eldest son's share of the total succession.[3]

By *collatio bonorum inter liberos*.

274. Referring to the next chapter for an exposition of the law of *collatio bonorum inter liberos*, it is only necessary here to observe that the object of such collation is to secure an equitable division of the legitim fund. The principle, as stated by Erskine,[4] is, that all provisions given by a father to his children during his lifetime are imputed in satisfaction of legitim, including not only the tocher given on his child's marriage, but sums of money advanced, though without any written acknowledgment or obligation to account. "Advances," says Professor Bell,[5] "will be imputed to the legitim in the following circumstances:—if made for the purpose of setting the child up in trade; or for a settlement in the world; or for a marriage portion." In conformity with this principle, it was held, in *Johnston* v. *Cochran*,[6] that a daughter who had received £500 as a marriage portion from her father, and in *Kay* v. *Kay*,[7] that a son to whom advances had been made to establish him in business, were bound to impute these provisions, with interest, in satisfaction of legitim. The exceptions are,—(1) advances intended as a recompense for services rendered;[8] (2) advances for

[1] *Anstruther* v. *Anstruther*, 20 Jan. 1836, 14 Sh. 272.

[2] *Anstruther's* case, *supra*; *Fisher's Trs.* v. *Fisher*, 5 Dec. 1850, 13 D. 245.

[3] *Fisher's Trs.* v. *Fisher*, decree, 13 D. 261. See the separate Chapter on Collation (Chapter VIII.).

[4] Ersk. 3, 9, 24 and 25.

[5] Bell, Pr. § 1588. As advances made *inter vivos* out of the revenues of heritable property do not tend to diminish the legitim fund, they do not fall to be collated (Ersk. *ut supra*; *Marshall* v. *Marshall's Trs.*, 21 Nov. 1829, 8 Sh. 110).

[6] *Johnston* v. *Cochran*, 13 Jan. 1829, 7 Sh. 226; see *Nicolson's Tr.* v. *Macalister*, 2 Mar. 1841, 3 D. 675. See Cod. lib. 6, tit. 20, l. 17 and 20 (Pr. and § 1); Cod. lib. 3, tit. 28, l. 29 and 30 (§ 2).

[7] *Kay* v. *Kay*, 12 July 1844, 16 Scot. Jur. 550; *Campbell* v. *Anstruther*, 16 June 1837, F.C.; *Duke of Buccleugh* v. *M. of Tweeddale*, 1677, M. 2369.

[8] See *Minto* v. *Kirkpatrick*, 23 May 1833, 11 Sh. 632, where it was decided that a son taken into partnership with his father was not bound to collate the value of the share in the stock in trade assigned to him; also *Gunn* v *Gunn's Tr.*, 28 Feb. 1833, 11 Sh. 484.

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maintenance and education in minority, or prior to emancipation, and which are due *ex debito naturali*;[1] and (3) advances made in loan, and for which the child was liable in repayment to the father and his executors.[2] In short, collation applies to provisions as distinguished from payments under obediential obligations, or taking the form of a contract.

Reduction of conveyances in defraud of legitim.

275. The right of collation must not be confounded with the right of the children to reduce conveyances to a favoured child not completed by possession, as being in defraud of legitim.[3]

SECTION II.

Satisfaction of Claims on the Heritable Estate and Executry.[4]

Whether right to undisposed-of moveable succession can be discharged.

276. Notwithstanding some authority of a contrary tendency,[5] it is more than doubtful whether the right to undisposed-of executry can be cut off by a discharge, or satisfied by a special provision. The passages in Stair and Erskine which have been supposed to countenance the proposition[6] seem rather to imply that the right will subsist, unless it is either defeated by a conveyance of the dead's part to some other person, or by an express renunciation on the part of the child himself in favour of the other members of the family. The principle that an heir cannot be excluded from the succession by disinherison has been given effect to in several cases relating to heritable succession;[7] and although it was held in an old case that a beneficial interest might

[1] *Irving* v. *Irving*, 1694, 4 Br. Sup. 144. See Stair, 3, 8, 26.

[2] *Webster* v. *Rettie*, 4 June 1859, 21 D. 915. See the English cases on the doctrine of advancement, cited in this report, 21 D. 921.

[3] *Hog* v. *Lashley*, 7 May 1792, 3 Paton, 247; *Johnston* v. *Johnston*, 23 June 1841, Hume, 290; *Balmain* v. *Graham*, 1721, M. 8199.

[4] The right of the children to claim from the father's estate the share of the *goods in communion* which might have been bequeathed by their deceased mother has been abolished by the Moveable Succession Act (18 and 19 Vict., cap. 23, § 6), and it has been thought unnecessary to treat separately of the satisfaction of this claim. The law is stated by Lord Fraser, 2d ed. p. 1070, *sqq.* The latest case that has occurred is *Sinclair's Exrs.* v. *Rorison* (11 Dec. 1852, 15 D. 212), where a father having settled £800 upon his daughter in liferent, and her children in fee, adding that he included her mother's share in that sum, and the daughter having repudiated the settlement, it was held that the value of the deceased wife's share of executry must be deducted, in accordance with the declaration in the will. *Leighton* v. *Russell*, 1 Dec. 1852, 15 D. 126, decided that a liferent of *universitas*, unaccepted, did not bar the claim of the wife's executors. See the cases noted *infra*, Chapter XLI., Section III.

[5] See 2 Fraser, 2d ed. p. 1075.

[6] Stair, 3, 8, 54; Ersk. 3, 9, 23.

[7] *Blackwood* v. *Dykes*, 26 Feb. 1833, 11 Sh. 443; *Sinclair* v. *Traill*, 27 Feb. 1840, 2 D. 694; *Stoddart* v. *Thomson*, 1734, Elch. "Succession," No. 1.

be given to testamentary executors by words of nomination, coupled with words excluding the testator's next of kin,[1] there is no authority for holding that the interest of a child in his father's intestate succession can be taken away by words of mere exclusion, whether occurring in a marriage-contract or a testament.

Estimate of the tendency of the authorities.

277. The case of *Wilson* v. *Gibson*,[2] and that of *Maitland*, are direct authorities to the contrary. In the former case, a father, by two testamentary dispositions in favour of his daughters, gave to each of them a liferent interest in certain heritable property, and the fee to their children, and declared in both cases that the conveyances should be accepted "in full satisfaction of all legitim, portion-natural, bairn's part of gear, *executry*, or other claims whatsoever which she or her heirs can ask or demand through my death, or the death of my deceased wife, or in any other manner of way; and that in case recourse shall be had to any of the said claims, whether legal or conventional, the rights of both liferent and fee hereby granted shall fall and become null and void." He died intestate as to his moveable succession, leaving a widow, who was separately provided for, her legal claims having been discharged. The Court held that the daughters were entitled to the entire moveable succession in equal shares. This case disposes of the theory of satisfaction as applied to executry. In *Maitland* v. *Maitland*,[3] the interest of the children of the marriage in legitim and *executry* was excluded by antenuptial contract; and in this case also, the widow having predeceased her husband, the children of the marriage were held entitled to the entire succession. The principle applicable to such cases is, that an heir or personal representative can only be excluded by giving the estate to another person.[4] In a later case the distinction appears to be taken between a receipt for an advance before the date of the will, which was held not to bar a claim for a legacy, and receipts subsequent to the will for money paid to account of the recipient's share of succession, the latter being held to be satisfaction of the legacy.[5]

Discharge of right to executry operates in favour of the brothers and sisters.

278. It has, however, been determined that a child may renounce his right to executry to the effect of devolving it upon his brothers and sisters, in the event of intestacy.[6] But it would

[1] *Beizley* v. *Napier*, 1739, M. 6591.

[2] *Wilson* v. *Gibson*, 30 June 1840, 2 D. 1236.

[3] *Maitland* v. *Maitland*, 14 Dec. 1843, 6 D. 244.

[4] In Special Case *Robertson*, 1869, 7 M. 1114, a lady entitled to one-fourth of a fund under the marriage-contract of her parents accepted it in her own marriage-contract in full of all her claims against the parents' estate; it was held that on the lapsing of another one-fourth share of the fund she was entitled to an equal share of it.

[5] *M'Laren* v. *Howie*, 1869, 8 M. 106.

[6] *Johnston* v. *Miller*, 26 June 1847, 9 D. 1389; *Campbell* v. *Campbell*, 1738, Elch. "Legitim," No. 4; M. 8187 and 9265; *Wright* v. *Burns*, 27 Jan. 1835, 13 Sh. 326.

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seem that such a renunciation will not operate in favour of more distant relatives.[1] And such renunciation must in express terms apply to executry; for a discharge of legitim, coupled with such general words as "all he can ask or demand," will not apply to executry, which is not a claim to be demanded, but a right of succession.[2]

Effect of collation between heir and executor.

279. In conclusion, it is to be observed that the heir's right to a share of executry is held to be satisfied if he accept the heritable succession, in virtue of the doctrine of collation, which is elsewhere discussed.[3] *Collatio bonorum inter liberos* (which has relation to gratuitous advances) does not affect the child's claim to executry; but the share of executry accruing to a child is of course subject to abatement in respect of proper debts incurred to the father, including money advanced in loan and entered in the father's books as a debt due to his estate.[4]

SECTION III.

Satisfaction and Discharge of Jus Relictæ.

Limits of the subject.

280. *Jus relictæ*, like legitim, may be either discharged by agreement, or satisfied by the acceptance of an equivalent provision. There does not seem to be, in relation to this particular claim, any room for the application of the doctrine of satisfaction by advances. As the husband is legally bound to maintain his wife during the subsistence of the marriage, the presumption is, that monies advanced to her during his lifetime must have been given in fulfilment of the husband's obligation to support her, and not as a provision for future maintenance. Our remark does not apply to funds settled by way of postnuptial provision. Such provisions are subject to similar rules of interpretation with antenuptial provisions, and, as will be seen, are in certain cases held to be given in satisfaction of legal provisions.[5]

Express discharge of *jus relictæ* by antenuptial contract.

281. (1.) Discharges of *jus relictæ* may be either express or implied; in consideration of a provision, or of the onerous obligation implied in marriage. It does not seem to be correct to say

[1] Ersk. *ut supra;* Bankton, vol. 2, p. 382; 1 Fraser, 601, and cases there referred to; *Campbell* v. *Campbell*, 1738, M. 8187, 9265; Elch. "Legitim," No. 4.

[2] *Sinclair* v. *Sinclair*, M. 8188; 13 Feb. 1770, 2 Pat. 199; *Anderson* v. *Anderson*, 1743, M. 5054; *Hepburn* v. *Hepburn*, M. 5056; Elch. "Executor," No. 12; *Pringle* v. *Pringle*, 1741, Elch. "Legitim," No. 5; and cases in Morrison, *voce* "General Discharge," p. 5046 *et seq.*

[3] Chapter VIII.

[4] *Webster* v. *Rettie*, 4 June 1859, 21 D. 915.

[5] The fact that such donations are revocable during life does not interfere with the application of the principle under consideration.

that *jus relictæ* may be gratuitously discharged; for a discharge by antenuptial contract, although it were granted without a pecuniary equivalent—which in practice is never done—is, in contemplation of law, an onerous discharge; and a discharge granted after marriage, without adequate consideration, is not binding.[1]

To render discharge effectual, *jus relictæ* must be named.

282. As we had occasion to remark with reference to legitim, the right intended to be discharged ought to be described by its proper name,[2] but this is not essential, and equivalent words in a contract of marriage executed in a colony have been sustained as excluding this right.[3] A widow to whom an annuity had been provided in her antenuptial settlement in the English form, which annuity she accepted "in lieu and full bar and satisfaction of the dower or thirds, which at common law or by custom she can or otherwise might claim from the estates of her husband," and also "in full bar and satisfaction of terce," was held not to have discharged her *jus relictæ* under that expression, but to be entitled to claim it in addition to the provisions settled upon her by the contract.[4] It had previously been held that a general discharge, as of "any aliment or other provision of the law competent to her as a wife,"[5] or of "all that she or her next of kin could claim in the event of her predecease,[6] was sufficiently broad to comprehend *jus relictæ*.

Constructive discharge by acceptance of a provision payable out of the entire estate.

283. Again, *jus relictæ*, equally with legitim, may be constructively discharged during the subsistence of the marriage, by the acceptance of a provision under a contract or settlement, under which the husband disposes of the fund which is subject to the widow's claim,—that is, under a settlement dealing with the totality of the moveable succession.[7] "When there is no antenuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election upon his predecease; and in the event of her death before she has had the opportunity of making her choice, the right of election passes to her representatives. On the other hand, if the wife has, during the subsistence of the marriage, consented to accept the provision in substitution for her legal claims, she may retract her

[1] *Hunter* (*Roughead's Tr.*) v. *Dickson*, 5 Sh. 267, N.E. 248; 19 Sept. 1831, 5 W. & S. 455.

[2] Ersk. 3, 9, 16.

[3] Special Case *Durrant Steuart's Trs.*, 1891, 18 R. 1114.

[4] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040. See *infra*, § 286, as to the extent to which *jus relictæ* is compatible with the acceptance of testamentary provisions.

[5] *Miller* v. *Broun*, 1776, M. 6456; 5 Br. Sup. 473; Hailes, 678.

[6] *Tod* v. *Wemyss*, 1770, M. 6451; and see Ersk. *ut supra*, and Bankton, vol. ii. p. 386. The form of expression last quoted in the text would seem to be applicable *in terminis* only to the wife's share of the goods in communion, which, prior to the Moveable Succession Act, she was entitled to bequeath.

[7] See the cases as to legitim, *supra*.

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consent as a *donatio inter virum et uxorem*, but her right of revocation, being strictly personal, cannot be exercised by her representatives."[1] Simple acceptance of a provision *inter vivos*, however large, does not bar the right to claim *jus relictæ* out of the husband's undisposed of estate.[2] The rule has been applied to provisions of every description, including simple money provisions,[3] settlements of conquest,[4] annuities,[5] and provisions of heritage.[6]

Whether discharge is implied from acceptance of a liferent of the husband's whole estate.

284. In the case of *Thomson* v. *Smith*,[7] the question was raised, but not decided, whether the acceptance of a liferent of the husband's whole estate implied a discharge of *jus relictæ*. The question is now determined in the affirmative by the decision of the House of Lords in *Edward* v. *Cheyne*.[8] The husband by his will gave his wife the life interest (through trustees) of his whole estate, and in the fourth purpose he directed his trustees, after the death of the survivor of the spouses, "and with her consent and full approval (in token of which she has subscribed this deed)," to apply a large part of the estate in payment of legacies; the residue (by a subsequent clause) being devoted to religious and charitable purposes. It was held, in a question with the wife's representatives claiming terce and *jus relictæ* in her right, (1) that the wife's consent was limited to the directions given to the trustees with respect to the payment of legacies mentioned in the fourth trust purpose; but (2) that, even when so limited, her consent was inconsistent with the claim set up by her representatives; because under the scheme of the will the legacies were to be paid out of the *universitas* of the estate, and the lady was not entitled after accepting a liferent to withdraw from the operation of the will one moiety of the testator's estate, and to have the legacies payable out of the dead's part only.[9]

285. (2.) The *jus relictæ* will be satisfied by a testamentary pro-

[1] Per Lord Watson in *Edward* v. *Cheyne*, 15 March 1888, 15 R. (H.L.) 34.

[2] *Keith's Trs.* v. *Keith*, *supra*, and cases noted below.

[3] *Howden* v. *Crichton*, 18 May 1821, 1 Sh. 14; see note to Faculty Report of *Collier* v. *Collier*, 6 July 1833; *Fraser* v. *Rankine*, 17 Dec. 1835, 14 Sh. 174; *M'Aulay* v. *Bell*, 1712, M. 3848.

[4] *Tod* v. *Wemyss*, 1770, M. 6451; Hailes, 384.

[5] *Ross* v. *Masson*, 3 Feb. 1843, 5 D. 483; *Dunlop* v. *Greenlees' Trs.*, 2 June 1865, 3 Macph. H.L. 46.

[6] *Cross* v. *Boyes*, 16 Jan. 1801, Hume, 484. It is obvious that even a universal legacy of *heritage* has no effect upon the rights of succession *in mobilibus* (*Urquhart* v. *Urquhart*, 20 Feb. 1851, 13 D. 742).

[7] *Thomson* v. *Smith*, 8 Dec. 1849, 12 D. 276. See *Leighton* v. *Russell*, 1 Dec. 1852, 15 D. 126, and *Baroness de Blonay* v. *Oswald's Reps.*, 17 July 1863, 1 M. 1147, where the same question was raised with reference to the claim of the wife's executors, and the widow's claim of interim aliment.

[8] 15 R. (H.L.) 33; affirming 11 R. 996.

[9] P. 36, per Lord Macnaghten; and see cases cited in Lord Watson's opinion, p. 34. See also *Caithness' Trs.* v. *Caithness*, 1877, 4 R. 937.

Satisfaction of *jus relictæ* by testamentary provisions.

vision in favour of the wife, and declared to be in satisfaction of *jus relictæ*, either expressly, or by being given as part of a general settlement under which the husband disposes of the totality of his moveable estate. And it is immaterial that the wife's provision is contained in a separate writing, if such writing form part of a total settlement.[1] The leading case is *Keith's Trustees* v. *Keith*,[2] where the distinction was taken between a marriage-contract provision and testamentary provisions by the husband. The former was considered not to be in satisfaction of *jus relictæ*, because it was not given under that condition, and the contract did not dispose of the husband's whole estate; the latter formed part of a universal settlement. The wife was therefore held bound to elect between the testamentary provisions in her favour and the *jus relictæ*, increased by her marriage-contract provision.[3]

Effect of discharge or satisfaction in enlarging the interests of other claimants.

286. Reference is made to the chapter on Election with reference to the subject of the effect of discharge or satisfaction of the claim of *jus relictæ* on the rights of other claimants of the succession.[4] The principle is, that a discharge of the *jus relictæ* in the husband's lifetime extinguishes the right, so that the moveable succession comes to be divisible in equal shares betwixt the children entitled to legitim and the husband's representatives; but that the acceptance of a testamentary provision in satisfaction of the *jus relictæ*, after the husband's death, operates in favour of the representatives only.[5]

SECTION IV.

Satisfaction and Discharge of Terce and Courtesy.

287. Terce and courtesy, like other legal claims, may be made the subject of discharge or satisfaction.

How terce an courtesy rights may be satisfied or discharged.

288. The interest of either of the spouses in the property of the other may be renounced *simpliciter* by antenuptial contract,[6] or excluded by a deed of entail;[7] and even after marriage these rights may be discharged for an equivalent provision, subject to

[1] *Caithness' Trs.* v. *Caithness*, 1877, 4 R. 937; *Stewart* v. *Stephen*, 29 Nov. 1832, 11 Sh. 139.

[2] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040; see *Bennet* v. *Bennet's Trs.*, 1 July 1829, 7 Sh. 817; *Johnstone* v. *Coldstream*, 30 June 1843, 5 D. 1297.

[3] In the case of the *Baroness de Blonay* v. *Oswald's Reps.*, 17 July 1863, 1 M. 1147, it was held (1) that a widow's claim for interim aliment or "alimony" to the first term after her husband's decease was not excluded by annuities granted by the husband *inter vivos*; but (2) that the claim was excluded by acceptance of a liferent of his testamentary estate.

[4] Chapter XII.

[5] *Fisher* v. *Dixon*, 2 Bell, 63, 78; and *Campbell's Trs.* v. *Campbell*, 24 D. 1321; overruling *Andrews* v. *Sawer*, 14 Sh. 589.

[6] See *Hamilton* v. *Boswell*, 3 Feb. 1720, Robertson, 346.

[7] *Hay Newton* v. *Hay Newton*, 1870, 8 M. (H.L.) 66, affirming 5 M. 1056.

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this qualification, however, that if the consideration in a post-nuptial contract is inadequate, the discharge may be revoked.[1] Terce and courtesy are of course liable to be affected by the diminution or conversion of the estate which forms the subject of these rights, but this matter, which relates to the nature of the interest, and not to its effect in competition with testamentary rights, has already been considered.

Exclusion of the terce under Statute 1681, cap. 10.

289. With reference to the doctrine of satisfaction, it is necessary to distinguish between terce and courtesy. In the former case, the doctrine is established by the provision of the Scottish Statute 1681, cap. 10, which enacts "that in time coming, where there shall be a particular provision granted by an husband in favours of his wife, either in a contract of marriage, or some other writ, before or after the marriage, that the wife shall be thereby secluded from a terce out of any lands or annual-rents belonging to her husband, unless it be expressly provided in the contract of marriage, or other writ containing the said provision, that the wife shall have right to a terce, by and attour the particular provision conceived in her favours."

Distinction in reference to courtesy.

290. In the case of the courtesy, the right is not excluded by a conventional provision, unless accepted subject to a declaration that it is in lieu of courtesy.[2] It is doubtful whether the acceptance even of a *mortis causa* provision forming part of a universal conveyance of the wife's heritable estate would deprive the husband of his courtesy, unless the *jus mariti* and right of administration were excluded; for the right to the courtesy is in a sense a continuation of the *jus mariti* after the death of the wife, and not strictly a right of succession;[3] and it is not to be presumed that a proprietrix, in disposing of her estate, means to dispose of her husband's vested interest in it. However, it may assumed that a trust for *immediate* division, giving a portion of the estate to the husband in lieu of his liferent, would put him to his election.

Acceptance of the special provision is necessary to the exclusion of terce.

291. Although by the terms of the Statute 1681, cap. 10, terce is excluded by any provision *granted* by the husband, it has been held, as an equitable construction of the enactment requires, that the wife's acceptance is necessary to an effectual exclusion. Where she has not accepted the conventional provision *stante matrimonio*, her right of election at the husband's death is indisputable.[4] And

[1] Chapter XXXVI. (Marriage Provisions). See *Mowat's Crs.* v. *Lauder*, 1697, M. 6395.

[2] See 1 Bell's Com. 7th ed. 682; *Primrose* v. *Crawford*, 1771, M. "Courtesy," App. No. 1; *Hamilton* v. *Boswell*, *supra*.

[3] Ersk. 2, 9, 55; 1 Bell's Com. 7th ed. p. 60.

[4] Stair, 2, 6, 17; *Cowan* v. *Kerr*, 15 Dec. 1830, 9 Sh. 188; *Douglas, Heron, and Co.* v. *Cant*, 1783, M. 11,461.

the infeftment of the wife in the fee of a part of the estate, without her consent, will not deprive her of her right of election.[1]

Satisfaction of terce by conventional provision under foreign settlement.

292. Whether terce is satisfied by a conventional provision under a foreign settlement, depends upon the question whether that provision is effectual and binding according to the law of the country in which it is made. The acceptance of a sum of money as a jointure under an English settlement has been held sufficient to bar the right of terce.[2] On the other hand, where the conventional provision included the liferent of the price of the granter's Scottish estate, which, by the form of the deed, was not effectually conveyed to her, the Court found the widow entitled to terce, on the principle that she had not succeeded to the full measure of the conventional provision intended for her.[3] In a more recent case, where a wife, by a contract of separation executed in America, received from the husband an annuity of £300 per annum, and afterwards received from the Court of Chancery of South Carolina a sum in name of alimony of 20,000 dollars, the terce was held not to be satisfied by the settlement of the annuity, as it was evident from the judicial proceedings which had since taken place that the previous arrangement was only temporary.[4]

[1] *Belshier* v. *Moffat*, 1779, M. 15,863.

[2] *Countess of Seafield* v. *The Earl*, 8 Feb. 1814, F.C.

[3] *Jankouska* v. *Anderson*, 1791, M. 6457; and see *Ross* v. *Aglionby*, M. 4631; M. "Foreign," App. No. 5; 15 Dec. 1797, 3 Pat. 621.

[4] *Nisbett* v. *Nisbett's Trs.*, 24 Feb. 1835, 13 Sh. 517.

CHAPTER VIII.

OF COLLATION.

1. Between Heir and Executor. | 2. Collatio Bonorum inter Liberos.

SECTION I.

Collation between Heir and Executor.

Collation applicable to executry and to legitim.

293. The heir-at-law, if entitled to succeed as one of the next of kin, or under the Moveable Succession Act, to a share of the executry estate, can only lay claim to it upon condition of collating (or communicating) the heritable estate with the other personal representatives, who must then collate the executry estate with him.[1] The heir is subject to the like obligation as a condition of claiming legitim in the case where he is one of the children of the predecessor.[2] But as he cannot collate the same estate twice, his obligation is held to be fulfilled by throwing the heritage into the combined legitim and executry funds for the purpose of distribution according to the rules of personal succession. Collation is a privilege of the heir which he is not bound to exercise for the benefit of the personal representatives; but it would seem that an heir may be compelled to collate by his creditors where his doing so would increase the value of the succession.[3]

Distinction between collation and an agreement to divide.

294. Where, upon an agreement to share heritable and moveable succession, any conditions are interposed which the law does not prescribe, this is not held to be collation, but a conventional arrangement, in which the agreement of the parties is the measure of their rights. Therefore, where the curator of a lunatic heir-at-law agreed with the next of kin to share the heritable and moveable succession, on condition that his ward's share should be paid entirely in money (the object being to avoid the objection of alienage), this was held to be a conventional arrangement, and not to have the effect of converting the ward's succession from heritable

[1] Ersk. 3, 9, 3; 1 Bell, Com. 7th ed. p. 95; Pr. § 1910.

[2] *Law* v. *Law*, 1553, M. 2365; *Murray* v. *Murray*, 1678, M. 2372; *Sinclair* v. *Sinclair*, 1768, M. 8188. Erskine appears to have overlooked the heir's right to legitim. Collation of legitim is not mentioned in the "Institute," and indeed the author expressly states that legitim belongs to the *younger* children of the family; Ersk. 3, 9, 23.

[3] See 1 Bell, Com. 7th ed. p. 99.

to moveable.[1] And where the eldest son of a farmer, in pursuance of a family arrangement, obtained himself confirmed executor, and entered on the management of the moveable estate, which was almost entirely absorbed in the payment of debts, it was held that the heir was not liable to account to his sister on the footing that he had collated.[2]

Heir not liable to collate with the relict.

295. *Jus relictæ* is not diminished by reason of the heir claiming moveable succession, since the fund divisible amongst children or representatives remains the same, whatever the number of claimants; consequently the heir, even where he is the sole next of kin,[3] is not liable to collate with the relict.[4]

International relations of the law of collation.

296. The heir's right to participate in the personal succession is a part of the law of personal succession, and is therefore regulated by the local law of the domicile. The correlative obligation to collate real estate is a rule of the law of personal succession in Scotland, and is therefore an obligation binding on any heir who lays claim to the personal succession of a person dying domiciled in Scotland, irrespective of the situation of the real estate which he may be required to communicate. In the application of the rule by which collation is subjected to the operation of the law of the domicile, it has been determined, *first*, that inasmuch as collation is unknown to the law of England, an heir who takes a share of a personal succession under the English Statute of Distributions, is not bound to communicate heritable estate situate in Scotland which he inherited from the same ancestor;[5] and, *secondly*, that a personal representative of an intestate dying domiciled in Scotland is bound to collate or communicate real estate in a colony to which he succeeded as heir under the local law of that colony.[6]

Subjects which fall to be collated.

297. The subjects of collation are, on the one hand, the whole of the free heritable succession, including heirship moveables;[7] and, on the other, the whole of that part of the free moveable succession upon which the heir has a claim—that is, executry or legitim, or both, as the case may be.[8] In the heritable estate leases are, of course, included;[9] and it is of no consequence that assignees are

[1] *Kennedy* v. *Kennedy*, 15 Nov. 1843, 6 D. 40.

[2] *Mitchell* v. *M'Michan*, 13 Jan. 1852, 14 D. 318.

[3] *Trotter* v. *Rochead*, 1681, M. 2375.

[4] *Balmain* v. *Glenfarquhar*, 1719, M. 2378; *Murray* v. *Murray*, 1678, M. 2374-5; *Trotter* v. *Rochead*, *supra*.

[5] *Balfour* v. *Scott*, 1793, 3 Pat. 300, reversing the judgment of the Court of Session M. 2379. In the case of *Douglas* v. *Douglas*, 1763, 5 Br. Sup. 896, the true principle appears to have been followed, but the report is very brief and somewhat obscure. *Robertson* v. *Robertson*, 16 Feb. 1816, F.C., and *Trotter* v. *Trotter*, 5 Sh. 78, N.E. 72, which are indexed under the head of Collation, are really cases of Election.

[6] *Robertson* v. *Macvean*, 18 Feb. 1817, F.C.

[7] *Pollock* v. *Pollock*, 1667, M. 5402.

[8] See this subject treated *infra*, *hunc tit.* (Mode of giving effect to Collation).

[9] *Stewart* v. *M'Naughton*, 2 Dec. 1824, 3 Sh. 351, N.E. 250.

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excluded by the terms of the lease, for, as will be seen hereafter, the obligation to collate may be fulfilled by crediting the common fund with the value of the heritable property which is to be collated.[1]

Division of the subject.

298. The questions which arise in the distribution of estate may be classified as follows:—(1) What heirs are subjected to the law of collation; (2) The mode of giving effect to collation; and (3) Collation as affected by Testamentary Provision, Contract, or Discharge.

Principle of collation illustrated in relation to legitim and executry.

299. I. WHAT HEIRS ARE SUBJECTED TO THE LAW OF COLLATION.—The case which best illustrates collation between heir and executor is that of an eldest son and heir-at-law claiming legitim and executry along with his brothers or sisters. In this case the heir may, as a condition of his sharing in the distribution of these funds, either convey to himself and the other children all the real estate, wherever situated, which he inherited from his father, or he may credit the family with its value, and receive in money the difference between its value and that of the share of the aggregate real and personal estates to which he is entitled. Collateral heirs, whether of line or of conquest, being of the next of kin of the predecessor, are entitled at common law to collate to the effect of sharing the executry;[2] and by the Moveable Succession Act,[3] an heir-at-law succeeding by representation, and being within the class of persons entitled to share in the distribution of the personal estate, may collate to the effect of receiving for himself, and the other issue of the person represented, the share of succession which that person would have taken, had he survived the intestate.[4] An heir-at-law who is the sole surviving child of the predecessor takes the legitim fund without collation, and if he is also the sole personal representative, he of course takes the executry also, in his proper right.

Collation includes subjects taken *præceptione* or in liferent.

300. Heirs of provision *alioqui successurus* are subject to the law of collation. In other words, an heir-at-law who claims a share of the personal succession must collate whatever he has received from the predecessor as a gift, whether by way of testamentary settlement or by deed *inter vivos*.[5] Where the provision

[1] *Fisher* v. *Fisher*, 5 Dec. 1850, 13 D. 245, cited *infra*, § 301.

[2] *Chancellor* v. *Chancellor*, 1742, M. 2379.

[3] 18 Vict., cap. 23, § 2.

[4] *Infra, hunc tit.* An heir-at-law, who is not also one of the next of kin, has no right at common law to share in the distribution of the personal estate; *M'Caw* v. *M'Caw*, 1787, M. 2383, overruling Ersk. 3, 9, 3.

[5] *Murray* v. *Murray*, 1678, M. 2374; *Baillie* v. *Clark*, 23 Feb. 1809, F.C.; *Fisher* v. *Fisher*, 19 Nov. 1844, 7 D. 129 Entail cases of *Gilmour*, *Anstruther*, and *Breadalbane*, cited *infra*. An heir of provision who is not heir *alioqui successurus*, *e.g.*, a younger son of the intestate, is not obliged to collate his provision with the executry or legitim, and may without collation take the share of personal succession to which his character entitles him;

comes in the shape of a settlement to a parent or parents in liferent, and the heir of the marriage in fee, it is necessary to consider in whom the fee is vested in the first instance. If the liferent is merely nominal, the parent being truly a fiar, then the person succeeding under the destination of the fee would not be bound to collate as a condition of claiming a share of the personal succession of the granter; but he would be bound to collate if he claimed personal succession of the nominal liferenter to whom he succeeds as heir of provision, being heir *alioqui successurus*. And conversely, in the case of a proper settlement in liferent and fee, the heir *alioqui successurus* is entitled to a share in the liferenter's personal succession without collating the provision, but must collate as a condition of sharing in the personal succession of the granter.[1]

Collation by an heir of entail.

301. An heir of entail, who is at the same time one of the next of kin and the heir of line of the person to whom he serves heir of provision, if he claims a share of the moveable succession, must collate the entailed estate. It appears, from the opinions of the judges in the leading case of *Little Gilmour*,[2] that an heir of entail would not be required to collate the value of the entire estate, but only the rents falling to himself or the value of his life interest:[3] and this view is in accordance with the principle established by the later case of *Fisher's Trustees* v. *Fisher*,[4] that the heir is only bound to communicate the value of the interest which he actually acquires by succession. The rule that entailed estate in the person of an heir *alioqui successurus* is subject to collation was confirmed by the House of Lords in the case of *Anstruther* v. *Anstruther*;[5] but the question as to the mode of giving effect to it was not raised, probably because it was not for the advantage of the heir to collate in any shape or way.

D. of Buccleugh v. *E. of Tweeddale*, 1677, M. 2369; *Rae Crawford* v. *Stewart*, 1794, M. 2384. It may be noticed that where the heir-at-law of one person succeeds as *persona designata* under the settlement of another, that heir takes as a singular successor; and conversely, if the heir-at-law of A, who is also one of his next of kin, takes personal succession from a stranger under a destination to "heirs and executors of A," he is not obliged to collate the heritage derived by succession from A.

[1] *Fisher* v. *Fisher*, 19 Nov. 1844, 7 D. 129. It need scarcely be added that the heir is not obliged to collate where he claims personal succession under a will or deed. Thus, where lands were destined to the heir of a marriage "and the conquest to the bairns," the heir, being a child of the marriage, was held to have right to a share of the conquest without collation; *Brown* v. *Brown*, 1680, M. 2375.

[2] *Gilmour* v. *Gilmour*, 13 Dec. 1809, F.C.

[3] See p. 458-9 of the Faculty Report.

[4] *Fisher's Trs.* v. *Fisher*, 5 Dec. 1850, 13 D. 245.

[5] *Anstruther* v. *Anstruther*, 16 Aug. 1836, 2 S. & M'L. 369, reported under previous dates in 12 Sh. 140, 1 S. & M'L. 463, and 14 Sh. 272. See also the cases of *Johnston* v. *Johnston*, 23 June 1814, Hume, 290, and *M. of Breadalbane* v. *M. of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377, where it was held immaterial (p. 398) that the heir was not the heir of line of the entailer.

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Collation by heirs-portioners.

302. The subject of collation between heirs-portioners and next of kin would appear not to have been fully understood by our leading writers. Erskine had evidently only considered the case of heirs who are daughters of the predecessor, which was the condition in the case of *Rickart,* to which he refers;[1] but it is singular that Bell, writing in full view of the case of *Balfour* v. *Scott,* should have failed to notice the distinction, to which we are about to advert,[2] depending on whether the heirs-portioners are or are not the sole next of kin.

(1.) Daughters of the predecessor, who are at once the sole heirs-portioners and the sole next of kin, are entitled, each in her proper right, to an equal share of the heritable as well as the moveable succession; and in that case it is a mere truism to say that collation does not take place. Collation, which is a mode of maintaining equality in the distribution of the moveable estate, can have no place where the whole heritable and moveable estates are already equally divided by the law of the succession.[3] So, also, where heirs-portioners, although not daughters of the predecessor, are his sole next of kin, the division is equal, and there can be no collation. Now, if in such a case the predecessor should settle his whole heritable estate upon one of the heirs-portioners, *e.g.,* upon the son of his eldest daughter, to the exclusion of his other grandchildren, no valid reason can be assigned for requiring the favoured heir to collate with the heirs-portioners who are disinherited. As regards the portion which the heir takes *alioqui successurus,* in virtue of the law of equal distribution in the female line, we have already seen that collation is excluded by the nature of the succession. As regards the portion which would have fallen *ex lege* to the other heirs-portioners, collation is equally excluded, because the property is acquired by singular title from the ancestor, and is therefore not a proper subject of collation. This is the point which was decided in the case of *Rickart,*[4] and although the authority of the decision has been questioned,[5] it appears to be unassailable in principle.

Balfour v. *Scott.*

303. (2.) In the case of *Balfour* v. *Scott*[6] we have an instance of a succession devolving to heir-portioners who were not the sole next of kin. Mr. Scott of Scotstarvet, whose succession was in question, died survived by two nieces, daughters of his brother, his heiresses-portioners, and by children of his sister, who succeeded

[1] Ersk. 3, 9, 3.

[2] 1 Bell, Com. 7th ed. p. 99, notes 4 and 6.

[3] Ersk. *ut supra; Rickart* v. *Rickart, infra.*

[4] *Rickart* v. *Rickart,* 1720, M. 2378.

[5] 1 Bell, Com. 7th ed. p. 98; *Gilmour* v. *Gilmour,* 13 Dec. 1809, per Lord Meadowbank, p. 457 of Faculty Report. But see Lord Cottenham's observations, cited *infra.*

[6] *Balfour* v. *Scott* (Scotstarvet Case), 1787, M. 2379.

to his personal estate in conjunction with their cousins. Under Mr. Scott's settlement the eldest daughter succeeded to the heritable estate without division. In the argument the case was distinguished from that of *Rickart* by the circumstance that, although all the heirs-portioners were next of kin, some of the next of kin were not heirs-portioners. The Court found that the defender, Miss Scott, was not entitled to claim any part of the executry of her uncle without collating his heritable estate, to which she succeeded as heir.[1] The judgment was reversed in the House of Lords, but upon a ground which does not affect the principle of the decision of the Court of Session;[2] and the distinction there taken between heirs-portioners who are and those who are not sole next of kin was approved by the House in the important case of *Anstruther* v. *Anstruther*.[3] "In the case of *Rickart*," said Lord Cottenham, Ch., "the question arose between two sisters, so that, as to two-thirds, the eldest sister was not heir-at-law, but took by special destination. But in the Scotstarvet case, in 1787, the circumstances were the same, except that the sisters were not sole next of kin; and there it was held by the Court of Session that the eldest sister, being heir of entail, must collate with those who were next of kin, but not heirs-portioners. The distinction between the two cases is obvious; the eldest sister was not in competition with heirs-portioners only, but with others, next of kin, who were not so. This judgment was reversed in this House, but merely upon the ground that, the domicile having been in England, the law of Scotland did not apply."[4]

Anstruther v. *Anstruther*.

304. Collation only arises as a condition of the right to claim heritable and moveable succession *of the same ancestor*. Where, therefore, moveable succession is claimed from the estate of a person who died in apparency, the heir in heritage cannot be required to collate as a condition of taking a share of the moveables, because his title as heir-at-law is made up by service to a remoter ancestor, and so the heritable and moveable successions are derived from different sources.[5] So also, where an apparent heir died without

Heir not bound to collate, where title derived from a different ancestor.

[1] M. 2383.

[2] *Balfour* v. *Scott*, 1793, 3 Pat. 300. 304. A portion of the judgment of the House of Lords is omitted in Morrison's Report, leaving the sense incomplete.

[3] *Anstruther* v. *Anstruther*, 16 Aug. 1836, 2 S. & M'L. 369.

[4] 2 S. & M'L. 374. The Moveable Succession Act, in the clause giving to heirs taking by representation the right to a share of the moveable succession (§ 2), extends that right to heirs-portioners, but only on condition of their collating with the other next of kin. This provision is therefore in consonance with the common law as explained in the text.

[5] *Spalding* v. *Spalding*, 1812, Hume, 119, and *Russell* v. *Russell*, 7 June 1822, 1 Sh. N.E. 435, note, both cited in 1 Bell, Com. 7th ed. p. 97, and by Lord Cottenham in *Anstruther's* case, 2 Sh. & M'L. 373. According to the rubric of the case of *Graham* v. *Graham*, 31 May 1834, 12 Sh. 664, it would appear that the son of

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exercising his right of collating the heritage, and the heritage was taken up by his son as *in hæreditate jacente* (passing over the father), it was held that the testamentary representatives of the apparent heir could not claim a share of the moveables, as they were not in a position to offer the heritage.[1] A younger brother serving heir to his father in consequence of his elder brother having died in apparency, will be bound to collate if he takes a share of his father's moveable succession.[2] It may be proper to notice, in conclusion, the case of collation between heirs and personal representatives taking under a designative bequest to the heirs of A. Under such a designation of heirs, the heritable estate devolves to the heir-at-law, the moveable to the personal representatives; and, on the principles that the succession is given to them *as if* it was intestate succession of A, it was determined that the heir could not claim a share of the moveable succession except on condition of collating the heritage.[3] According to Lord Moncreiff's opinion in the case of *Sinclair*,[4] this is an unwarranted extension of the principle of collation into the region of testate succession, and the question will probably be reconsidered on its merits should it again be brought to a decision.

Heir may either convey, or communicate the value of the estate.

305. II. MODE OF GIVING EFFECT TO COLLATION.—It is now settled that the heir has the option of retaining the estate and paying over its value in money to the executors as part of the fund for division amongst all the personal representatives.[5] But he is not bound to settle on the footing of a money payment. Collation is described by the institutional writers as a communication of the heritable estate itself with the other next of kin, who, in their turn, it is said, must collate or communicate the executry with him.[6] And in an early case it is expressly stated that "the Lords admitted the heir to a share with the other bairns, providing that he communicate all that he had of the heritable estate by disposi-

an heir-apparent was required to collate with his father's executors; but this finding only occurs in an interlocutor of the Lord Ordinary, which was recalled by the Court.

[1] *Newbigging's Trs.* v. *Steel's Trs.*, 11 M. 411. "The right of an heir," said Lord Ardmillan, "being one of the next of kin, is not that of a person primarily entitled to both moveable and heritable estate, but it is a primary right to heritage which he may extend by collation so as to obtain a share of the moveables."

[2] *Law* v. *Law*, 1553, M. 2365. As to collation between heirs and executors taking under a designative bequest, see note at end of this chapter.

[3] *Blair* v. *Blair*, 1849, 12 D. 97.

[4] *Sinclair's Trs.* v. *Sinclair*, 8 R. at p. 757. The point decided in this case was that the eldest representative of an heir of entail, to whom a special legacy had been left by his father, was not bound to collate his interest in the entailed estate as a condition of obtaining a share of the legacy; the reason being that collation does not arise where the personal representatives take by will.

[5] *Fisher's Trs.* v. *Fisher*, 5 Dec. 1850, 13 D. 245.

[6] Ersk. 3, 9, 3; Bell, Pr. § 1910.

tion or succession, by being infeft, and disponing to the children an equal share with himself of the said heritable estate, with the burden of an equal share of the heritable debt."[1] It cannot therefore be doubted that the heir sufficiently discharges his obligation to collate with the executors by making up a title to the heritable estate which he acquired from his ancestor either as heir-at-law or by disposition, and executing a conveyance of it in favour of himself and the other personal representatives *pro indiviso*, in proportion to the values of their respective interests. Where the estate is heavily burdened, it may be for the interest of the heir to convey *in forma specifica* rather than to make a payment as for an estimated value which might not be realised.

Executors are only entitled to a money compensation.

306. In many cases the heir might be desirous of keeping the estate. Collation is founded on equitable considerations, and it would be against equity that the executors should have the power of demanding a specific conveyance merely to compel the heir to buy back the family estate at an exorbitant price, or of insisting on sharing, *pro indiviso*, subjects which would be better managed by a single proprietor. It is true that the heir as a *pro indiviso* proprietor would be entitled at common law to insist on a sale; and where heritable estate is actually vested *pro indiviso* in a plurality of proprietors, there is no other mode of effecting a separation of interests, because, in the case supposed, the rights of all the proprietors are of the same character. But the object of collation is to throw the value of what the heir receives of heritage into the shares drawn by the next of kin of the executry, and no injustice is done to the executors by obliging them to receive their share of the *universitas* of the succession in money. These considerations, which apply with peculiar force to the case of an heir of entail collating his life interest in the entailed estate,[2] induced the Court in the case of *Fisher's Trustees* v. *Fisher*[3] to establish the rule that an heir-at-law is entitled to receive his share of the personal estate on accounting to the executors for the value of his interest as at the date of the opening of the succession. It was accordingly found that the executors, in a case of collation, are not bound to hold the heritable property as *pro indiviso* proprietors, nor is any one of them entitled to require that the property shall be conveyed over *pro indiviso* with a view to being held in that state until a period arrived when, at the termination of a liferent lease, its value might be expected to increase.[4] In that case the value of the heir's

[1] *Murray* v. *Murray*, 1678, M. 2374.

[2] See *Anstruther* v. *Anstruther*, 16 Aug. 1836, 2 S. & M'L. 369; *Breadalbane's Trs.* v. *Marquis of Chandos*, 2 S. & M'L. 377.

[3] *Fisher's Trs.* v. *Fisher*, 5 Dec. 1850, 13 D. 245; see 253.

[4] See the terms of the judgment, 13 D. 261.

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interest was left to be ascertained extrajudicially in accordance with the principles settled by the interlocutor of the Court. If the parties should be unable to agree, it may be presumed that the Court would remit to a valuator appointed by themselves, upon whose report they would ascertain and fix the amount to be paid to the executors as compensation for the value of the heritable succession.

Rule of distribution of the collated succession.

307. In the distribution of collated estate the mode of division will be as follows:—One-third of the free executry estate (debts and obligatory provisions being deducted), or one-half of that estate, as the case may be, will be set apart for payment of the *jus relictæ*. The remainder will then be massed with the free heritable estate, or its value. Upon this common fund heritable debts will form a first charge if they have not been already allowed for in the estimated value of the collated heritage. Legacies will rank next in order. The residue constitutes the divisible fund, which will either be partly heritable and partly moveable, or wholly moveable, according as the collation is carried out by a conveyance of the heritage *pro indiviso*, or by means of a money payment by the heir to the personal representatives. In the case first supposed, the *pro indiviso* collated estate retains its character of heritage in a question as to the succession of one of the next of kin. In a case of a succession accruing before the abolition of fees of conquest, the succession was held to belong to the heir of line, but it is not clear from the decisions whether this last result followed from the nature of the succession independently of the nature of the subject collated.[1] Where all the parties are in the relation of next of kin to the predecessor, the division will be in equal shares, whether the succession consist of executry and legitim or entirely of executry. Where some of the parties take by representation, it is necessary to distinguish between these two cases.

Computation, where some of the personal representatives are entitled to legitim.

308. *First*, Where the succession consists exclusively of executry; if the heir be one of the next of kin, and the other executors, or any of them, take by representation under the Moveable Succession Act, the common succession is divisible *per stirpes*. Where the heir succeeds by representation, the division is also *per stirpes*, such being the effect of the provision in the Moveable Succession Act under which the heir in heritage taking by representation is entitled to collate, to the effect of claiming for himself alone, or in conjunction with the other issue of the person whom he represents, the share of moveable succession which might have been claimed by that person if he had survived the intestate.[2] Heirs-portioners succeeding by representation take among them the share of the

[1] *Napier* v. *Orr*, 1868, 6 M. 264 (Whole Court).

[2] 18 Vict., cap. 23, § 2.

common fund which would have accrued to the party represented.[1] *Secondly*, Where the succession consists of executry and legitim, and the heir is a son of the intestate, one-half of the succession is executry, and is divisible according to the rules already explained; the other half is legitim, and is divisible amongst the surviving children to the exclusion of the issue of predeceasing children. In this case it must be observed that legacies are chargeable exclusively upon that half of the common fund which constitutes the executry or dead's part. *Thirdly*, Where the succession consists of executry and legitim, and the heir succeeds by representation: in this case the principle of division is entirely dissimilar to that which has been described. An heir succeeding by representation has no right to any share of the legitim fund, but is bound to collate the whole heritage with the executry or dead's part. The legitim as well as the *jus relictæ*, if any, must therefore be set apart out of the free moveable estate before the heritable estate is communicated. The heritable estate, or its value, will then be massed with the executry or dead's part, and the value, under deduction of debts and legacies, will be shared by all the personal representatives, including the heir, *secundum stirpes*.

How the value of the heritable estate is to be estimated.

309. Where collation is effected by communicating the value of the heritable succession, the proper course will be to allow for debts and provisions which are chargeable in the first instance upon the heritable estate. In the case of *Fisher*, already cited, it was found that in ascertaining the value of the heir's interest the burden of a liferent lease must be ascertained and deducted as a liferent held by the particular individual according to the actual value of his individual life. The heir was also found entitled to a deduction for meliorations. In that case the widow of the predecessor had a liferent of the heritable estate, and the action having been brought after her death, it was held that the value of the subjects must be computed as at the period of her death, when the succession opened.[2] Where collation takes place during the subsistence of a liferent interest in the heritable estate, the heir having only the reversion, the proper mode of computation would be to value the life interest as at the death of the predecessor, to deduct its value from the gross value of the estate as at the same date; the balance, with interest from the death of the predecessor, would then constitute the collatable fund. Where heritable estate is conveyed *in*

[1] § 2. Under this section the brothers and sisters of an heir who shall not collate, and their descendants in their place, "have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation." This provision is discussed *supra*, Chapter VI., Section I. (Intestate Succession in Moveables).

[2] *Fisher's Trs.* v. *Fisher*, 13 D. 261.

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forma specifica, the debts and provisions affecting it are a burden on the common fund, and the heir will be a creditor of the *pro indiviso* proprietors for any debts or burdens which he may have discharged before the execution of the conveyance.

Modifications of the law of collation through will or contract.

310. III. How affected by Testamentary Provision, Contract, or Discharge.—The right of collation and the mode of distribution of the collated estate are liable to be affected by those voluntary arrangements under which legitim and, to a certain extent, executry may be satisfied or discharged. It is proposed to examine the conditions under which collation may be modified by contract or settlement, and to indicate, as briefly as possible, the special modes of distribution which may result from such arrangements.

Where the personal estate consists of executry only.

311. (1.) Where the personal estate consists wholly of executry.—This may happen either where the personal representatives are not children of the predecessor, or when, being children, their right to legitim is barred by antenuptial contract or discharged in the parent's lifetime.[1] Executry, being within the power of the predecessor up to the last moment of life, may be barred at any time by a testamentary instrument disposing of the estate in a manner different from the legal order of succession; and a declaration that a legacy is to be accepted in satisfaction of executry is equivalent to a bequest of the legatee's share of executry to the other personal representatives.[2] Where all the children of a family or other personal representatives are debarred from executry, the exclusion is necessarily ineffectual, unless the succession is otherwise disposed of.[3]

Rules applicable to this case.

312. From these considerations, the following results with reference to collation may be deduced:—1. If legitim is barred, the heir collates the heritage with the executry. 2. If the executry is also barred, without being given to any one, the exclusion is ineffectual, and the result as to collation is the same. 3. If some of the executors only are excluded from participation in the succession, the value of their shares is to be regarded as testate succession, and to that extent the heir would seem to be entitled to share in the executry without collation. 4. If the heir is excluded from participation, the executors may decline to collate with him.

[1] See Chapter VII. (Exclusion of Legal Claims).

[2] *Clark* v. *Burns*, 27 Jan. 1835, 13 Sh. 326; *Johnston* v. *Miller*, 26 June 1847, 9 D. 1389.

[3] *Maitland* v. *Maitland*, 14 Dec. 1843, 6 D. 244. The collateral relatives could not take as personal representatives, in respect of the exclusion of the children, because the character of personal representative attaches by operation of law, and cannot be affected by any conventional exclusion on the part of a testator.

Where the personal estate includes legitim subject to election.

313. (2.) Where the personal estate to be collated consists of legitim, or executry and legitim, and the children have the right of election.—This may happen where testamentary or postnuptial provisions are settled on them in satisfaction of legitim. The renunciation of legitim, consequent on the acceptance of a conventional provision in lieu of it, enures to the benefit of the general succession,[1] and the right of requiring the heir to collate the heritage as a condition of sharing the legitim passes with it.[2] Where legitim is claimed by the heir-at-law, the trustees or residuary legatees of the predecessor will then be entitled, as assignees of the legitim renounced by younger children, to require the heir to collate, and to take benefit by his collation. It would seem that an exception must be admitted to the rule, that renunciation of legal provisions enures to the benefit of the general estate, in the case where the party electing to renounce is the heir-at-law. For the trustees could only claim the legal provision renounced in their favour on condition of collating the heritage; and this, in the case supposed, they would not be able to do.

Effect of election by one child.

314. This exhausts the consideration of the effect of renunciation where the fund to be collated consists of legitim alone. Where it embraces both legitim and executry, and one or more of the children claim legitim, while the other or others elect to take their conventional provisions in lieu of legitim, the aggregate heritable and moveable succession is divided; one moiety, representing legitim, will be dealt with in conformity with the preceding suggestions; the other will be divided according to the rules laid down in the first subdivision of this section. (III. 1.)

Where legitim is only excluded as to some of the children.

315. (3.) Where the fund consists of legitim, or executry and legitim, and the claimants have no right of election.—This happens where the right to legitim subsists as to some of the children, and is barred by antenuptial contract or discharge *inter vivos* as to the others. In such a case the shares of the children whose legitim is barred or discharged lapse in the same manner as by death;[3] and the benefit of the discharge enures to the surviving children whose legitim is not barred or discharged. And first, if all the younger children have discharged their right to legitim, the heir takes the entire legitim fund without collation;[4] but if he should also claim executry, he would be obliged to collate the heritable succession with that part of the moveable succession which falls to the per-

[1] *Fisher* v. *Dixon*, 6 April 1843, 2 Bell, 63. See Chapter VII., Section I. (Exclusion of Legal Claims).

[2] *Robertson* v. *M'Vean*, 16 Jan. 1813, cited by Lord Cottenham in *Fisher* v. *Dixon*, and reported as an appendix to that case, 2 Bell, 87.

[3] *Hog* v. *Lashley*, 1792, 3 Pat. 247; *Panmure* v. *Crokat*, *infra*.

[4] *Panmure* v. *Crokat*, 28 Feb. 1826, 18 D. 703, and cases there referred to.

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sonal representatives. Next, if some only of the younger children have discharged their legitim, the heritage will fall to be collated with the combined legitim and executry fund, whereof one-half will be divisible amongst the children (including the heir) whose legitim is not discharged; and the other half among the personal representatives of the predecessor, including the heir. Lastly, if the heir have discharged his legitim, there is then no place for collation of legitim; but if the heir wishes to share in the distribution of the executry, he must collate the heritage with that part of the moveable succession.

SECTION II.

Collatio Bonorum inter Liberos.

Principle of *collatio bonorum*, or collation of advances.

316. In the preceding chapter it was shown that a discharge of legitim in the father's lifetime, in consideration of provisions settled on the child or advances made for his behoof, enures to the benefit of the other children who have not discharged their legitim. The application of this principle to the case of advances or partial provisions, not given as a full equivalent for the share of legitim falling to the donee, constitutes the doctrine of *collatio bonorum inter liberos*. The principle is, that the value of such advances or provisions is to be added to the legitim fund, out of which the donee is then to receive such a sum as, when added to the advances already received, will place him on a footing of equality with the other children. The fund available for division among the children entitled to legitim remains the same, whether the rights of those children who have received provisions in anticipation be wholly extinguished, as in the cases of exclusion by antenuptial contract and express discharge *inter vivos*, or be only partially compensated, as in the case of advances which are not expressly given in consideration of legitim. In the former case the child is held to have received a full equivalent for the legitim due to him. In the latter the Court take cognisance of the value of what has been actually received, treating it as a partial payment to account of legitim, the object being, as stated by the institutional writers, to preserve a fair proportion between the shares obtained by the children out of the moveable estate of their father, in accordance with his presumed intention.[1]

Doctrine of the Civil Law in relation to the emancipation of children.

317. The doctrine of collation amongst children claiming legitim appears to have been borrowed from the provisions of the prætorian edict,[2] which in their origin were intended to secure an equitable

[1] Stair, 3, 8, 45; Ersk. 3, 9, 24; Bell, Pr. § 1588.

[2] Authorities cited in preceding note.

partition of the succession between emancipated children and those who had continued subject to their father's *patria potestas*, but were extended to marriage portions and *donationes propter nuptias*. Children not emancipated were incapacitated from acquiring property of their own, and, as their earnings during the father's lifetime tended to augment the value of his succession, it was provided by the edict that the emancipated children should collate their private property as a condition of sharing the patrimonial inheritance. The following summary, which is transcribed from Mackeldey's Manual,[1] embraces all that is necessary to be observed for the purposes of this treatise respecting the provisions of the later Civil Law *de collatione bonorum*.

What subjects fell to be communicated under the Civil Law.

318. Where descendants were called to the succession of their ancestor they were bound to collate[2] or to communicate to the common succession everything which they had respectively acquired from the ancestor during his life to the extent to which they had been benefited.[3] This was done either by direct conveyance or by imputing the value of the gift. According to the later law, no distinction was made between *sui hæredes* and emancipated children, nor between heirs testamentary and *ab intestato*. Among the number of things which were subjected to collation the more important were the *dos* and *donationes propter nuptias*.[4]

Exceptions under the Civil Law.

319. Among the things excepted from collation were—(1) by operation of law, aliment and the expenses of education, the *peculium castrense* or *quasi-castrense* which the son received from his parents;[5] also everything which the descendant acquired upon the death of the ancestor by legacy, trust, or *donatio mortis causa*;[6] the fruits and interest of things subjected to collation;[7]

[1] Mackeldey, Manuel de Droit Romain, ed. Beving, Bruxelles, 1846, p. 336.

[2] Ulpian, 28, 4 (Gneist's Syntagma, p. 324); Dig. 37, 6-8; Cod. 6, 20; Nov. 18, c. 6; Nov. 97, c. 6. For the bibliography of the subject see Mackeldey *in loc. cit.*

[3] One who is not the heir-at-law is not bound to collate, Dig. 37, 7, fr. 9. Grandchildren inheriting from a grandfather are bound to collate not only what they themselves received, but also that which their predeceasing father or mother ought to have collated, even when they are not heirs of the latter. This results from the terms of the 118th Novel, c. 1, "Tantam de hereditate morientis accipiunt partem, quantam eorum parens, si viveret, habuisset." But this rule suffers exception where the grandchild has only been instituted by the grandfather for his legitim; Cod. 6, 20, const. 20. Ascendants and collaterals of the defunct were never subjected to the law of collation.

[4] Cod. 6, 20, const. 12, 16, 17, 19, 20, pr. If the thing subjected to collation has perished without the fault of the heir, he is not bound to collate its value; Dig. 37, 6, fr. 2, § 2; Nov. 97, c. 6.

[5] Dig. 37, 6, fr. 1, § 15; Cod. 6, 20, const. 12, 20, pr. The *peculium* which the children acquired, under the ancient law for the father, in the later law for themselves, was not required to be collated.

[6] Dig. *ibid.*, fr. 1, § 19; Cod. *ibid.*, const. 10, 13, 15.

[7] Provided that the party liable in collation is not *in mora;* Dig. 37, 7, fr. 5, § 1.

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finally, *donationes inter vivos simplices* (*vel mortis causa*) which a child received from his parents, provided that another child had not received a donation *sub causa* (*e.g., dos vel donatio propter nuptias;* for, in this case, the simple donation must also have been collated.[1]

Exemption from liability to collate.

320. (2.) Besides, the testator had the right of exempting one or more of his descendants from the collation, provided that in so doing he did not encroach upon the legitim of the others;[2] and, conversely, he could order the collation of provisions which were not properly subject to it, provided that he had given them without being bound to it by the law, and that the obligation to collate had been imposed at the time when the donation was made.[3]

Collatio according to modern jurisprudence of Scotland.

321. Rules of equity more or less analogous to the doctrine of collation in Scotland have obtained a place in the jurisprudence of other countries. According to the law of England, children claiming shares of personal succession from their father's executors are bound to communicate provisions received by way of advancement in his lifetime,[4] and an equitable rule of the same nature existed under the common law of France.[5] It does not appear that in the application of the principle of collation to the special questions which arise under the Scottish law of succession much assistance has been derived from the Civil Law or from foreign systems of jurisprudence; and indeed, on the last occasion when the subject came under the consideration of the Court of Session, those sources of authority were distinctly repudiated. The reader is referred to Lord Fraser's treatise for an exposition of matters deducible from the Civil and French Law of collation.[6]

Collatio bonorum in Scotland applies only to the division of legitim.

322. The sole object of *collatio* in the law of Scotland is to secure an equitable division of the legitim fund, irrespective of the claims of other parties interested in the distribution of the father's estate. The right to call for the collation of advances pertains, therefore, solely to the claimants of legitim, who alone take benefit by the collation of such advances. Accordingly, children claiming legitim are not bound to collate with the father's residuary legatees or trustees;[7] and where one of the children of the family becomes entitled to the entire legitim fund in consequence of the rights of the other children having been excluded or discharged, the

[1] Cod. 6, 26, const. 20, § 1.

[2] Nov. 18, c. 6.

[3] Cod. 6, 20, const. 20, § 1, *in fine;* Dig. 5, 2, Pr. et fr. 25; Cod. 3, 28, const. 35, § 2.

[4] Williams' Exrs. 8th ed. 1507; 2 Peere Williams, 439, 440; *Gilbert* v. *Wetherell*, 2 Sim. & St. 254; *Berry* v. *Morse*, 1 Cl. H.L. Ca. 71.

[5] Pothier, Traité des Successions, chap. 4, art. 2 (ed. Dupin, tom. 7, p. 192). Merlin, Repertoire, Art. "Rapport á Succession" (tom. x. p. 247, §§ 15, 16).

[6] 2 Fraser, 2d ed. p. 1033 *et seq.;* and see Burge's Com. vol. iv. pp. 671-712.

[7] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040. See pp. 1051-1057; *Trevelyan* v. *Trevelyan*, 1873, 11 M. 516.

claimant cannot be required to impute a provision received in the father's lifetime to account of the legitim.[1] So also, in a question with the widow, children claiming legitim are not bound to collate so as to increase her share;[2] and similarly, where a widow is entitled to provisions from her husband, by contract or deed, which are not declared to be in satisfaction of *jus relictæ*, these are not to be deducted from her share of the moveable succession, but, in so far as unpaid, they form a charge upon the entire succession.[3]

Whether collation is a right personal to the child.

323. Since the publication of the last edition, the subject of *collatio inter liberos* has come before the Court in more than one important case on the point whether the obligation to collate advances, and the relative right to call for its fulfilment, are relations of law purely personal to the children of the deceased. There are at least two forms of the question: (1) Where a son or daughter has received advances from his father, and claims his share of legitim, while the other children are content to take the provisions given to them by the father's will, thus discharging their shares of legitim, do the children, who in the case supposed have surrendered their legitim to the uses of the will, retain the active title or right of calling on the dissentient child to collate the sums advanced by his father, *i.e.*, to bring them into the legitim fund? (2) Supposing the conditions so far changed that the children who have received advances from the father elect to abide by his will, has the child who has received no advance from his father, and who is claiming his share of legitim, the right of calling on his brothers and sisters to collate their advances, or has he this right against the father's executors or trustees, as the administrators of the unclaimed part of the legitim fund?[4] The first of these questions was considered in *Nisbet's Trustees* v. *Nisbet*;[5] the second was the question in the much debated case of *Monteith*.

324. In *Nisbet's* case, where the subject in controversy was a

[1] *Clark* v. *Burns*, 27 Jan. 1835, 13 Sh. 326; *M. of Breadalbane* v. *M. of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377. In this case one of the family (a daughter) had received the sum of £30,000 on her marriage as her "portion or fortune." These words were held not to apply to legitim, and the legitim of the other children of the family having been discharged, the claimant was held to be entitled to the entire legitim fund, in addition to the special provision.

[2] *Ross* v. *Kellie*, 1627, M. 2366; *Balmain* v. *Glenfarquhar*, 1719, M. 2378.

[3] *Keith's Trs.* v. *Keith*, *supra*.

[4] In the last edition this opinion was hazarded: "Where the right to a claim of legitim devolves to the residuary legatee in consequence of the claimant having elected to take a testamentary provision in lieu of it (*Fisher* v. *Dixon*, 6th April 1843, 2 Bell, 63), it would seem that the legatee, who as assignee of a share of legitim has the right of requiring the heir in heritage to collate (*Robertson* v. *M'Vean*, 2 Bell's Appeals, p. 87), would also have the right to compel collation of advances, and would himself be liable to collate advances received by his cedent."

[5] *Nisbet's Trs.* v. *Nisbet*, 1868, 6 M. 567.

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sum of about £6000 advanced to the son for the purchase of his commission in the army and steps of promotion, it does not seem to have been suggested that the right to require collation was intransmissible. Lord Cowan, who delivered the leading opinion, considers very fully the argument maintained for the son by his *curator bonis*, and rejects it. After quoting from the judgment of the House of Lords in *Fisher* v. *Dixon* the declaration that the acceptance of a provision declared to be in satisfaction of legitim "operated in favour of the general disponee," the principle of which, he says, is clear and cannot be impugned, he continues—"The child who has not lost right to legitim cannot be injured by anything done by the other children in the way of accepting the conventional provisions in satisfaction of legitim after the father's death; but as little can he be benefited. . . . . The general disponee in any question with respect to the amount of it takes the child's place. The respective interests of the child entitled to legitim, and of the children whose claims have been satisfied, necessarily fall to be ascertained on the same footing as if all the children had, upon the father's death, got their respective interests fixed on principles of proper accounting." Lord Benholme said, "The only question here is, whether the right of the residuary legatee in the latter case" (*i.e.*, the election to take under the will) "extends only to the legitim itself, or embraces also the share of the collated fund. In principle, I think there is no difference between these two." The opinion of Lord Neaves is to the same effect. The Lord Justice-Clerk Patton was absent. The judgment expressly finds that the advances must be collated as a condition of the claim of legitim; and it appears to the writer that the ground of judgment to be collected from the opinions is that of a *transfer by operation of law* of their shares of legitim from the children who elect to abide by the will to the executors or residuary legatees of the will, carrying with it the attendant right to have the legitim fund enlarged by the contributions of the child or children to whom advances were made by the father.

Case of advances to a child who accepts testamentary provisions.

325. Now, this principle, if consistently carried out, would, in the second case supposed, enable the child who claimed legitim, but had not received advances, to call upon the executors or residuary legatees to bring into the legitim fund the advances to the other children, which *ex hypothesi* are payments to account of legitim, and ought to pass by operation of law as legitim to the testamentary representatives of the father. But this cannot in the meantime be affirmed to be law, because on this second question the same Court, differently constituted, threw over the doctrine of legal transfer or assignation, and determined that the daughters

who had elected to abide by the will could not be required to collate their marriage provisions either directly or by putting the obligation upon the trustees of the will, to whom the benefit of the unclaimed shares of legitim resulted. The opinion of Lord Moncreiff[1] is very important and instructive, and his criticism on *Fisher* v. *Dixon*, and Lord Cottenham's judgment—which, he says, trenched somewhat on the impressions of our older lawyers as to the absolute integrity and segregation of what is called the legitim fund—lead, by very cogent reasoning, to the result that the sphere of collation is confined to the adjustment of accounts between those children *who are claiming adversely to the will*. The point is also concisely put by Lord Rutherfurd Clark at the end of his opinion: "When a child accepts conventional provisions, he discharges his claim to legitim. He does not assign it. He merely withdraws the restraint which as a child he possessed over the testamentary power of his father."

326. The cases of *Nisbet* and *Monteith* do not stand very well together; to say the least, they leave the law in a position of unstable equilibrium, in which the disinherited son of the future will have need of the best legal advice to assure himself as to his rights in relation to legitim.

What description of *inter vivos* provisions fall to be collated with the other children.

327. Other questions which have arisen in the application of the law of collation have relation to the description of advances and provisions which fall within its scope. The general rule is, that all sums actually advanced by the father to the child, or on his behalf, must be collated, though no written acknowledgment had been taken.[2] The nature and amount of the advances may be the subject of proof by such evidence as is usually admitted in actions of accounting;[3] or, in default of other evidence, payment may be proved by the oath of the party.[4] "Advances," says Professor Bell, "will be imputed to the legitim in the following circumstances,—if made for the purpose of setting the child up in trade, or for a settlement in the world, or for a marriage portion."[5] In conformity with this principle, it was held in *Johnston* v. *Cochran*[6] that a daughter, who had received £500 as a marriage portion from her father, and in *Kay* v. *Kay*[7] that a son to whom

[1] *Monteith's Trs.* v. *Monteith*, 1882, 9 R. 982, at p. 990.

[2] Ersk. 3, 9, 24.

[3] See Lord Ivory's opinion in *Webster* v. *Rettie*, 4 June 1859, 21 D. 915-24.

[4] Ersk. *ut supra*.

[5] Bell's Pr. § 1588.

[6] *Johnston* v. *Cochran*, 13 Jan. 1829, 7 Sh. 226; and see *Nicolson's Tr.* v. *Macalister*, 2 March 1841, 3 D. 675; *Russell* v. *Brown*, 1687, M. 8177; *Monteith's Trs.*, *supra*.

[7] *Kay* v. *Kay*, 12 July 1844, 16 Jur. 550. See also *Campbell* v. *Anstruther*, 16 June 1837, F.C.; *D. of Buccleugh* v. *E. of Tweeddale*, 1677, M. 2369; *Douglas* v. *Douglas*, 1876, 4 R. 105; *Nisbet's* case, *supra*; *Welsh* v. *Welsh*, 1878, 5 R. 542.

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advances had been made to establish him in business, were bound to impute these provisions, with interest, in satisfaction of legitim. Money advanced to a son to assist him in circumstances of pecuniary embarrassment was held to be an advancement, and to be subject to collation; but it was thought doubtful whether an annuity of £15 a year, settled upon the son's wife, fell within the same category.[1] Provisions to children by bond or deed are clearly of the same nature as marriage portions, and must be collated.[2]

Provisions by antenuptial contract.

328. With regard to unpaid provisions constituted by antenuptial contract, and not declared to be in satisfaction of legitim, it is not possible to state with confidence the actual result of the authorities. Two principles, apparently inconsistent, but capable of being reconciled, are deducible from the decisions; *first*, marriage-contract provisions are debts, though postponed to the debts of onerous creditors, and, if not paid in the lifetime of the father, form a charge against the whole succession;[3] *secondly*, such provisions, if paid in the father's lifetime (the time of payment being immaterial to the question, whether paid in his lifetime or after his death), are advances which the grantee may be required to collate.[4] In a question, therefore, with the father's trustees or executors, provisions not declared to be in satisfaction of legitim are payable out of the first of the estate, and the claim to legitim remains entire; but in a question with the other children claiming legitim they must be collated. The result is, if we correctly estimate the bearing of the authorities, that provisions *inter viros*, not declared to be in satisfaction of legitim, go to increase the legitim fund, and are divisible amongst all the children who have claims upon that fund.

329. Collation does not extend to testamentary or deathbed[5]

[1] *Skinner* v. *Skinner*, 1775, M. 8172.

[2] Stair, 3, 8, 45; Bankton, vol. 2, p. 381; Ersk. 3, 9, 24. Interlocutor in *Henderson* v. *Henderson*, cited by Lord Corehouse, 14 Sh. 596. The case is reported of date 1782, M. 8191.

[3] Stair, 1, 5, 6; Ersk. 3, 9, 22; *Murray* v. *Murray*, 1678, M. 2372; *Fraser* v. *Bishop*, 1638, M. 3941: *M'Kay* v. *Fowler*, 1744, M. 3948. And this is understood to be the import of the final decision in the case of the *M. of Breadalbane* v. *M. of Chandos*, 16 Aug. 1836, 2 S. & M'L. 377. The interlocutor of the Court, which was affirmed on appeal, bears that, "in respect the said Marchioness of Chandos is the only younger child of the late Marquis of Breadalbane who has not renounced the right of legitim, find that her claim extends over one-third part of the free moveable estate of her said father, and that it is not to be reduced in amount by imputing thereto any part of the sums provided to her by her said father in her contract of marriage, *and which sums, in so far as not yet satisfied, must form a deduction from the trust-funds* in medio,"—2 S. & M'L. 385.

[4] *Nisbet* v. *Nisbet*, 1726; Robertson, 594-600, which, so far as it affirms this proposition, is not affected by the Lord President's observation's in *Keith's* case; cases already cited upon bonds of provision and marriage portions. The point appears to have been assumed in *Keith's Trs.* v. *Keith*, 19 D. 1040, 1051, 1057, and in *Monteith's* case, 9 R. 982.

[5] A father cannot relieve his child

In general, money received in loan, or under a contract, is not subject to be collated.

provisions, for these are chargeable against the executry or dead's part, and do not tend to diminish the legitim fund; nor to funds given by the father in his lifetime as a donation in addition to legitim,[1] or with the equivalent explanation that the grantee is not to collate,[2] or that he should have an equal proportion of his goods at his death,[3] or should be considered a bairn in the house.[4] Some other exceptions have been recognised by the decisions, which may be reduced to the following heads:—(1) advances intended as a recompense for services rendered;[5] (2) advances for maintenance and education in minority or prior to emancipation, and which are due *ex debito naturali;*[6] and (3) advances made in loan, and for which the grantee was liable in repayment to the father and his executors.[7] In short, collation applies to provisions as distinguished from payments under obediential obligations, or which are made on the footing of contract.

from the obligation to collate by a deed executed on deathbed,—*Grant* v. *Gunn's Trs.*, 28 Feb. 1833, 11 Sh. 484. Deathbed conveyances fall within the description of deeds which may be reduced in so far as prejudicial to legitim, as to which see *Hog* v. *Lashley*, 7 May 1792, 3 Pat. 247, and other cases cited *supra*, § 254.

[1] Advances charged upon the father's heritable property, or provided out of its revenues, do not tend to diminish the legitim fund, and accordingly do not fall to be collated,—Ersk. 3, 9. 25; *D. of Buccleugh* v. *E. of Tweeddale*, 1677, M. 2369; *Marshall* v. *Marshall's Trs.*, 21 Nov. 1829, 8 Sh. 110.

[2] *Per curiam* in *Grant* v. *Gunn's Trs.*, *supra.*

[3] *Corson* v. *Corson*, 1631, M. 2367.

[4] *Beg* v. *Lapraik*, 1737, M. 2379, Elch. *voce* "Forisfamiliation," No. 1, and notes; *Spence* v. *Stevenson*, 1766, M. 8178. "But," observes Erskine, "the father's declaration in the bond of provision, that the child is to continue in his family, and consequently to be entitled to a share of the legitim, seems to be but a slight evidence of his purpose that the child is not to collate, for collation is admitted only among those who are entitled to legitim," —3, 9, 25.

[5] *Minto* v. *Kirkpatrick*, 23 May 1833, 11 Sh. 632, where it was held that a son, taken into partnership with his father, was not bound to collate the value of the share in the stock in trade assigned to him.

[6] *Irving* v. *Irving*, 1694, 4 Br. Sup. 144; Stair, 3, 8, 26; Ersk. 3, 9, 24, *infin.*; Bell, Pr. § 1588; 1 Fraser, 575. Under the same principle fall these inconsiderable presents which are given rather as tokens of affection than as substantial contributions towards the maintenance or upbringing of the child, as to which see Lord Ivory's observation in *Webster* v. *Rettie*, 21 D. 926, second paragraph.

[7] *Webster* v. *Rettie*, 4 June 1859, 21 D. 915. Here the payment was held to be a loan, because the father had ranked for the amount in bankruptcy, and entered the dividend, with accruing interest, as a debt due by the son in his books. See also *Grant* v. *Gunn's Trs.*, 28 Feb. 1833, 11 Sh. 484.

CHAPTER IX.

LAW OF DEATHBED.

1. Incapacity, how arising.
2. Deeds liable to challenge at Common Law.
3. Title to challenge ex capite lecti.
4. Exclusion of the Heir's Title, and Effect of Revocation.

Law of deathbed as affecting conveyances.

330. By the common law of Scotland, a person labouring under mortal disease was held not to have the capacity of executing deeds of importance in relation to his estate and succession. A testator might indeed at any period of our history have executed a testament or disposition of moveables upon deathbed; but in those earlier times, when the law of deathbed originated, the property which might be the subject of bequest would be of very inconsiderable value in comparison with the landed estate. There was the less reason for extending the law of deathbed to dispositions of moveable property, because such dispositions, when granted *mortis causa*, would only affect the dead's part, and would not diminish the legal portions of the wife and children. The state of legal incapacity resulting from mortal sickness applied to all deeds prejudicial to the succession of the heir-at-law or of provision, to the interest of the granter's children in the legitim fund,[1] and to the widow's rights, whether in relation to terce [2] or to *jus relictæ*.[3] By the Act 34 and 35 Vict., cap. 81, on the preamble that it is expedient to abolish all challenges and reductions in Scotland *ex capite lecti*, it is enacted "That no deed, instrument, or writing made by any person who shall die after the passing of this Act shall be liable to challenge or reduction *ex capite lecti*." Thus the

[1] Stair, 3, 4, 29; Ersk. 3, 9, 16. The cases illustrative of the doctrine that alienations *inter vivos*, tending to diminish the legitim fund, are reducible *ex capite lecti* are noticed *supra*, § 254, in connection with the subject of legitim. It is, however, in its relations to heritable property that the law of deathbed is of chief importance, and to this application of the law our observations will be mainly confined. Reductions at the instance of the widow or younger children are necessarily governed by the same rules as challenges at the instance of the heir.

[2] It is undoubted that terce and courtesy are within the principle of the law of deathbed: but except the bare statement of the institutional writers, that deathbed deeds do not prejudice the rights of the relict and children, we have not been able to find any authority for the doctrine. The case cited by Mr. Fraser (i. 613 of the original edition appears to have relation to personal property.

[3] Stair, 3, 4, 29; Ersk. 3, 9, 16.

law of deathbed, which makes such a notable figure in the reports of the preceding century, has itself been stricken with mortal sickness. It exists only as conferring a right of action on the heirs of testators who died before 16th August 1871, and it is not likely that any such action will ever be brought. It has, however, been thought proper to retain the chapter relating to this subject, because of its possible bearing on questions as to past successions,[1] and also because there is no other complete account of the development of this ancient restriction of the testamentary power, a restriction which the writer conceives to be essentially sound, and which may yet in some more convenient form be revived.

Appointments of tutors.

331. At common law a father had the capacity of appointing tutors to his children by testament or *mortis causa* deed upon deathbed;[2] but the power of appointing tutors with limited responsibility, conferred by the Statute 1696, cap. 8, must, in terms of the Statute, be exercised in *liege poustie;* and the power of appointing curators to children, which was first given by this Statute, is subject to the like condition as to the father's capacity. It is not clear that the recent Act of Parliament takes effect on the appointment of tutors and curators. The Statute 1696 makes it a *condition* of the power of appointing tutors and curators that the father shall be of disponing power, and such an appointment, if made on deathbed, may be treated as a nullity. But as the Act of 1871 only cuts off the right of reduction *ex capite lecti*, it may be held to apply only to deeds and writings which are capable of ratification by the heir, and which at all events are valid and effectual if unchallenged.[3] It has also been doubted whether the Act of 1871 applies to gifts in fraud of legitim which are made by delivery of money or securities, as to which reference is made to the observations of the writer in the case of *Hay* v. *Coutts' Trustees*.[4]

Division of the subject.

332. The questions for consideration are—(1) How the incapacity resulting from deathbed arises; (2) as to the deeds liable to challenge *ex capite lecti;* (3) as to the title to challenge deeds executed upon deathbed; and (4) how the operation of the law of deathbed may be excluded. In this division of the subject we follow substantially the order of arrangement of Professor Bell, to whose luminous and accurate, though no longer exhaustive discussion of the subject, the writer is largely indebted.[5]

[1] In the case of *Thain* v. *Thain*, which came into Court twenty years after the passing of the deathbed repeal Act, a proof was taken on the question whether the testator was labouring under mortal disease, and legal questions were raised which opened the whole law of this subject. See the Report in 18 R. 1196.

[2] Ersk. 1, 7, 2; Fraser on "Parent and Child," 2d ed. p. 176, and authorities there cited.

[3] See *Greig* v. *Greig*, 1872, 11 Macph. 20.

[4] 1890, 18 R. 245.

[5] 1 Bell's Com. 7th ed. 80-94.

CHAPTER IX.

SECTION I.

How the Incapacity resulting from Deathbed arises.

Theory of the common law in relation to incapacity resulting from mortal illness.

333. Viewed in relation to his incapacity to dispose, a person in his ordinary state of health, and not a minor nor subject to any legal incapacity, is said to be in "*legitima potestate*" or in "*liege poustie*," because he has the full and uncontrolled power of disposal of his property. The restraint on this power begins with the commencement of his mortal disease. The decay of the vital powers is usually accompanied with a certain infirmity of the will, rendering the moribund person more or less accessible to the importunities of interested attendants; and this facility or liability to imposition was, by the ancient law of Scotland, converted into a legal presumption, according to which all deeds executed during the granter's last illness were reducible in so far as prejudicial to the rights of the heir. At common law the presumption of incapacity in relation to deathbed deeds (that is, deeds executed while the granter was ill of the disease of which he died) could only be redargued by the counter presumption of convalescence arising from the granter having been at kirk or market after the execution of the deed. But by the Statute 1696, cap. 4, the survivance of the granter during the space of sixty days "is a sufficient exception to exclude the reason of deathbed." The statutory exception appears to proceed on the supposition that the infirmity of the will, which is associated with the final decay of the physical powers, is not to be presumed to have commenced at a period more remote than the limit which the Statute assigns. Incapacity at a period more remote than sixty days may be proved; but the presumption will be in favour of the party interested in maintaining the settlement as having been executed in *liege poustie*.

334. Three topics of inquiry are thus presented, namely, (1) as to the evidence of mortal disease which is requisite to raise up the presumption; and (2 and 3) as to the two counter presumptions to which we have referred.

Evidence in relation to the plea of deathbed.

335. I. Proof of Mortal Disease.—In order successfully to challenge a deed *ex capite lecti*, it must be averred and proved not only that the deed was executed within sixty days of death, but also that at the time of its execution the granter was ill of the disease which caused his death.[1] This is to be established by the evidence of medical practitioners or other persons to the satisfaction of the Court or a jury.[2] It is not necessary to prove the con-

[1] Ersk. 3, 8, 96; 1 Bell, Com. 7th ed. p. 82.

[2] In *Cogan* v. *Lyon*, 18 March 1834, 12 Sh. 569, the Court admitted the testi-

tinuity of the disease during the whole period subsequent to the execution of a deed; for, says Erskine,[1] "if the two extremes be proved, of sickness going before and of death following, the rest is inferred;" but evidence of the continuing of the original disease is often the best proof of its identity with that which was the immediate cause of death.[2]

Exception where death results from accident or supervening disease.

336. Although labouring under sickness at the time of making the deed, this is not held to be his mortal disease if the granter should perish by an accident; nor will the original disease be regarded as mortal, if the actual cause of death is a new disease unconnected with that which existed at the execution of the deed.[3] But where the disease which is the immediate cause of death, though distinguishable from the original disease, is either a secondary or ulterior form of the malady, or induced by it, it will be held to be a continuance of the same malady. "If," says Professor Bell, "the diseases are convertible, or found in close connection and relation with each other, or where the last disease is an ordinary consequence of the first, it will be sufficient to make out a case of deathbed."[4]

Plea of deathbed not limited to cases of acute disease.

337. Reduction *ex capite lecti* is not confined to cases of disease which physicians call mortal; nor is it implied in the name of deathbed that the illness should be such as actually to confine the patient to his bed,[5] or to his chamber,[6] or to interrupt business.[7] It is sufficient that the maker of the deed is at the time in that state of infirm health which, especially when occurring in a person of advanced age, may be regarded as the precursor of final decay,

mony of medical men as to the nature of the disease and the cause of death, although their opinions were rested solely on the facts stated by unprofessional persons, neighbours and acquaintances of the deceased.

[1] Erskine, *ut supra.*

[2] As deeds granted on deathbed are not null, but are only reducible at the instance of the heir, a decree of reduction proceeding upon evidence, and granted *causa cognita*, may be a necessary part of the heir's title; and for this reason the Court are in use to grant proof and to advise such cases *ex parte*, if requested by the pursuer. See the last reported case on this point, *Eason* v. *Eason*, 18 July 1863, 1 M. 1163.

[3] *Paterson's Trs.* v. *Johnston*, 24 June 1816, 1 Mur. 71, and cases in Hume, *voce* "Deathbed," particularly *Thomson* v. *Thomson*, 1801, p. 142, and *Gray* v. *Gray's Trs.*, 1813, p. 144; *Mackay* v. *Davidson*, 6 Sh. 367, 25 March 1831, 5 W. & S. 210, where the granter died from disease resulting from dram-drinking.

[4] Bell's Com. 7th ed., p. 83; *Hiddlestone* v. *Goldie*, 12 April 1819, 2 Mur. 115, 120; *Weir* v. *Knox*, 1791, Hume, 135; *Brock* v. ——, 25 May 1813, Hume, 137; *Black* v. *Brown*, 21 Nov. 1816, Hume, 154.

[5] *Shaw* v. *Gray*, 1624, M. 3208.

[6] *Robertson* v. *Fleming*, 1622, M. 3290; *Black* v. *Black*, 1787, M. 3302.

[7] But confinement contrary to the usual custom of the granter is an indication of illness, and may go far to establish the existence of mortal disease where the party was withdrawn from the observation of neutral witnesses.

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and that the infirmity results in death.[1] A surgical or organic malady or accident causing death is regarded as a mortal disease.[2]

Statutory presumption of convalescence from survivance for the period of sixty days.

338. II. SURVIVANCE FOR SIXTY DAYS.—At common law, if the granter of a deed was affected by mortal disease at the time of its execution, and convalescence was not proved, the deed was held to have been executed on deathbed, irrespective of the period of survivance.[3] Attendance at kirk or market unsupported was conclusive evidence, but not the only competent evidence, of convalescence. On a consideration of the inexpediency of that state of the law, it was enacted by the Scottish legislature,[4] "That it shall be a sufficient exception to exclude the reason of deathbed, as to all bonds, dispositions, contracts, or other rights, that shall be hereafter made and granted by any person after the contracting of sickness, that the person live for the space of threescore days after the making and granting of the said deeds, albeit, during that time, they did not go to kirk and mercat; but prejudice always, as of before, to quarrel and reduce the said rights and deeds, if it shall be alleged and proven that the person was so affected by the sickness, the time of the doing of the said deeds, that he was not of sound judgment and understanding."

Computation of time in relation to deathbed.

339. The presumption of convalescence, or rather of strength of will sufficient to resist importunity, is established by the elapse of the statutory period of sixty days, the period of survivance being determined according to the ordinary rule of computation of civil time. The date of execution, being *punctum temporis*, is excluded from the computation, and the date of death is reckoned among the days of survivance according to the maxim, *Dies inceptus pro completo habetur*. Accordingly, where a settlement was executed on 22d February 1791, about eight P.M., and the granter survived fifty-nine days and two hours, and died on the 22d April between ten and eleven P.M., being the fifty-ninth day after the execution of the deed, it was held by the House of Lords that the statutory period of survivance was not completed.[5] Lord Thurlow observed,[6] "The

[1] *Primrose* v. *Primrose*, 1756, M. 3300; *Robertson* v. *M'Caig*, 1 Dec. 1823, 2 Sh. 544, N.E. 474; *Tomison* v. *Tomison*, 14 Dec. 1839, 2 D. 239. Compare the cases of *Speirs* and *Gray*, Hume, 144, and *Lillie* v. *Lillie*, Hume, 153. "A man may grow weaker and weaker, and die without any formed disease at all, and yet his settlements may be reduced *ex capite lecti*."—Per Lord Braxfield, in *Crawford* v. *Kincaid*, 1782, Hailes, 907.

[2] *Dun* v. *Dun*, 1668, M. 3291, a case of a broken leg, afterwards amputated; *Scotston* v. *Drummond*, 1694, M. 3297, a case of a sore leg occasioned by accident.

[3] See *Gordon* v. *Gordon*, 1696, M. 3299, where the Court were asked to reduce a deed *ex capite lecti* although the granter had survived *three years*. This appears to have been the last case under the old law.

[4] Stat. 1696, cap. 4.

[5] *Mercer* v. *Ogilvie*, 1793, M. 3336; 1 Dec. 1796, 3 Pat. 434; overruling *dictum* of the Lord President Dundas in *Crawford* v. *Kincaid*, 1782, Hailes, 907, and cited in 3 Pat. 438.

[6] 3 Pat. 442.

terminus a quo mentioned in the Act is descriptive of a period of time, and synonymous with the date or day of the deed, which is indivisible, and *sixty days after* is descriptive of another and subsequent period, which begins when the first period is completed. The day of making the deed must therefore be excluded; so the maker only lived fifty-nine days of the period required. Had he seen the morning of the sixtieth or subsequent day, it would have been sufficient; the rule of law above mentioned (*dies inceptus pro completo habetur*) then applying, and making it unnecessary and improper to reckon by hours, or to inquire if the last day was completed." Conversely, a deed was sustained when the date of execution was 23d May 1799, at two P.M., and the granter survived fifty-nine days and twenty-three hours, and died on 22d July at one P.M., being the *sixtieth day after the day of execution*.[1]

Result of the cases on computation of time.

340. A deed is therefore safe from challenge *ex capite lecti* if the granter has survived the hour of midnight which separates the fifty-ninth from the sixtieth day after the execution of the deed. It is not always possible to determine with precision the moment of the cessation of vital action; and the validity of a settlement may come to depend on the question whether the testator is proved to have been inanimate at the moment of the commencement of the sixtieth day. In such cases the general presumption of life seems to be applicable. On principle, it appears that the hour of midnight must be determined according to the civil or mean solar time of the meridian of the place, although, for convenience, it is customary in this country to reckon time according to the meridian of Greenwich, and in other European countries according to the mean time of the principal national observatory.

Evidence in relation to the date of execution.

341. In the case of a probative deed, the testing clause affords *prima facie* evidence of the date of execution;[2] but it is competent, in a reduction, to prove the true date by extrinsic evidence.[3] An untested holograph deed did not prove its own date, and if the date cannot be instructed by extrinsic evidence, the deed will be presumed to have been executed on deathbed.[4] But an exception

[1] *Mitchell* v. *Watson*, 3 Feb. 1804, M. "Deathbed," App. No. 4.

[2] See Dickson on Evidence, §§ 714, 715, and cases there cited; also *Gibson* v. *Pott*, 2 March 1813, Hume, 150.

[3] *Arnott* v. *Gairdon*, 1730, M. 12,285; *May* v. *Ross*, 1667, M. 12,279; *Yeats* v. *Yeats' Tr.*, 6 July 1833, 11 Sh. 915; *Campbell* v. *Fisher*, 7 July 1838, 16 Sh. 1279. But where the deed has been misdated, for the purpose of evading the law of deathbed, it has been held that persons who are accessory to the fraud cannot take benefit by the deed; *Merry* v. *Howie*, 1806, M. "Writ." App. No. 3, 5 Pat. 101, as to which see Mr. Dickson's observations *in loc. cit.*

[4] *Cunningham* v. *Ramsay*, cited in note to *Haddoway* v. *Inglis*, 1673, 3 Br. Sup. 200; *Maitland* v. *Maitland*, 16 May 1815, F.C.; Stair, 3, 4, 29; Ersk. 3, 8, 96. Per Lord Moncreiff in *Waddell* v. *Waddell's Trs.*, 16 May 1845, 7 D. 605; *Suttie* v. *Ross*, 3 Feb. 1838, 16 Sh. 429, Macf. Rep. 139; *Fairholme* v. *Fairholme's Trs.*, 16 Dec. 1856, 19 D. 178.

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must be admitted in the case of death resulting from accident or external violence, or even, as it should seem, in the case of instantaneous death from natural causes, where there were no premonitory symptoms; for in these cases, as there is no apparent pre-existing disease, there is no room for the application of the law of deathbed.

Kirk or market proof, but not the only proof, of convalescence.

342. III. CONVALESCENCE—GOING TO KIRK OR MARKET.—We have already seen that actual convalescence obviates all objection on the score of deathbed, insomuch that, although the granter should die within sixty days after the date of execution, but of a new disease, the deed will be held good. But convalescence followed by a relapse of the same disease will not save a deed from reduction *ex capite lecti*, unless the fact of convalescence is established in the manner required by our ancient law—that is, by proof of the person having been at kirk or market unsupported after the execution of the deed. Presence at kirk or market unsupported is, in fact, a legal criterion of convalescence in the degree required to support a deed previously executed; as it is presumed that a person who has strength sufficient to enable him to go about his ordinary avocations has also the capacity to settle his affairs, and, if necessary, to cancel or revoke any gift which may have been improperly obtained from him while under the influence of disease. The priuciples of the law or custom in relation to kirk and market are declared in an Act of Sederunt of date 29th February 1692, the text of which will be found in the subjoined note.[1]

[1] Act anent persons going to church and mercate after granting of dispositions; 29 Feb. 1692. "The Lords of Council and Session taking to their serious consideration that the excellent law of deathbed securing men's inheritances from being alienate at that time, may happen to be frustrate and evacuate if their coming to church or mercate be not done in such a solemn manner as may give some evidence of their convalescence, without supportation or straining of nature; and seeing some may think it sufficient if parties, after subscribing such dispositions, come to the church at any time, and make a turn or two therein, though there were no congregation at the time; and likewise, if they make any merchandise privily in a shop or crame, or come to the mercat-place when there is no public mercate; and all this performed before their own pickt out witnesses, brought along by the party in whose favours the disposition is made, that the state and condition of his health or sickness may be as little under the view and consideration of other indifferent persons as can be; the occasion of which mistake might have been that formerly there were publick prayers morning and evening in the church in many places, to which those who apprehended any controversie might arise upon the validity of their dispositions were accustomed to come at the time of prayer: And some thought they might come to the church though there were no publick meeting thereat, since these publick prayers were not accustomed, and to take instruments of their appearing there: For remede whereof, the Lords declare they will not sustain any such parties going to church and mercate, where it is proven that he was sick before his subscriving of the disposition quarrelled, as done *in lecto*, unless it be performed in the daytime, and when people are gathered together in the church or churchyard for any publick meeting, civill or ecclesias-

Object and effect of the rule in relation to kirk and market.

343. The first point to be noticed in the construction of the Act of Sederunt is the inferential declaration, that the object of coming to kirk or market is to afford evidence of convalescence. By this it is not meant that the person shall be restored to his ordinary health, but merely that he is so far recovered as to give attendance at kirk or market in the manner required by the Act; and the legal presumption resulting from such attendance cannot be overcome by proof that the person was at the time suffering from the disease of which he died. In the case of diseases attended with mental incapacity, as acute fevers, some forms of paralysis, and the like (termed *morbus sonticus*), going to kirk or market would not prove capacity for making a will. It would be an answer to the objection of deathbed, but would still leave the disposition exposed to challenge on the ground of incapacity, or facility and circumvention.[1]

Attendance either at kirk or at market held to satisfy the Statute.

344. The Act of Sederunt speaks of attendance at "church and mercate," but attendance at either, with the precautions there prescribed, is held to be sufficient.[2]

Attendance must be "without supportation or straining of nature."

345. Next, it is required that the granter shall appear "without supportation or straining of nature." The degree of support is a question of fact; and it is unnecessary to enter on an examination of the decisions upon such questions. It may, however, be observed that very slight indications of weakness will be sufficient to invalidate an appearance at kirk and market when made for the purpose of supporting a particular deed; whereas, if the evidence relates to the ordinary attendance of the deceased at church, or the resort to a public market for purposes of business, it will not invalidate the evidence that the person has received such aid as he or she would receive on ordinary occasions. A lady, in walking to church, takes the arm of a member of her family; the jury would be directed to consider, on the whole evidence, whether the arm was offered for the purpose of affording necessary support.[3] "The rule," says Professor Bell,[4] "is, that the granter shall be seen in the same con-

tick, or when people are gathered together in the mercat-place, for publick mercate: And further declares, whenever instruments are taken for the end forsaid, that the said instrument do expressely bear, That it was taken in the audience and view of the people gathered together as aforesaid, otherways the Lords will have no regard to the said instrument."

[1] *Crawford* v. *Brichen*, 1711, M. 3312; *Laird* v. *Kirkwood*, 1763, M. 3315; *Faichney* v. *Faichney*, 1776, M. 3316, 5 Br. Sup. 422; 1 Bell, Com. 7th ed. p. 85.

[2] *Balmerino's Crs.* v. *Lady Couper*, 1671, M. 3305, 3292; *Ragg* v. *Forbes*, 1725, M. 3314.

[3] See the decisions on this point in the Dictionary, pp. 3303-3318; also *Young* v. *Scott*, 1777, 5 Br. Sup. 423; *Angus* v. *Monylaws*, 1793, Hume, 137; *Harvie* v. *Reston*, 1799, Hume, 139; *Cowan* v. *Cowan*, 20 Feb. 1817, Hume, 142; *Smyth*, 2 July 1812, Hume, 148; *Ormiston* v. *Greig*, 17 May 1821, 1 Sh. N.E. 14, note.

[4] 1 Bell, Com. 7th ed. p. 85; and see Stair, 3, 4, 28; Ersk. 3, 8, 96.

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dition, in so far as regards aid from others, as while in good health; and the rule in this respect is tightened or relaxed, as the act of going to kirk or market is done in the ordinary course of business or for the mere purpose of giving effect to the deed."

Attendance must be public. Reason of this rule.

346. The Act of Sederunt requires that the appearance shall be public, in church or market, while the people are assembled; and any instrument taken on the occasion (and therefore any proof offered) must show that the appearance was made "in the audience and view of the people gathered together." The purpose of requiring the granter's presence on occasions so public is that his state of health or sickness may be under the view and consideration of "indifferent persons," instead of being confined to "picked out witnesses," brought by the party in whose favour the disposition is made.[1] Where attendance is given at church or market for the purpose of validating a deed executed *in lecto ægritudinis*, it is not necessary that the granter should either attend the service of the church, or make bargains in the market;[2] but if he do either, he must be careful not to betray symptoms of weakness, as by leaving the place of worship before the service is over, or taking the assistance of a companion in making a purchase. Attendance at a meeting of heritors in the church, or at a funeral in the churchyard, is within the terms of the Act. Whether attending service at a Dissenting place of worship is sufficient to satisfy the law has not been expressly determined; though in the case of *Livingstone* v. *Goodal*,[3] it was observed from the Bench that the maker of the deed, "being a Quaker, was not obliged to go to church to ratify his deed." It is suggested that attendance by a Dissenter at his proper place of worship for the purpose of Divine Service should be received as equivalent to attendance at church; but attendance at a secular meeting in a chapel would clearly not be sufficient.

What is held to constitute attendance at market.

347. It is not clearly settled what shall be held a market in the sense of the rule of law. The Act of Sederunt seems to intimate that any shop or warehouse where goods are publicly sold had been considered a market for the purpose of satisfying the rule: and at the present time, when markets have in many towns been entirely supplanted by retail shops, it may safely be asserted that appearance in any of the principal thoroughfares of business in a city or town for the purpose of business would be received as proof of convalescence. The decisions so far support this view of the law. Thus, the Cross of Edinburgh was held to be a market-

[1] Preamble to Act of Sederunt, cited *supra*.

[2] *Tailzeour* v. *Tailzeour*, 1787, M. 3317, where it was held that walking through the market-place, while market was held, to the house of a friend, was sufficient.

[3] *Livingston* v. *Goodal*, 1683, M. 3321.

place;[1] and appearance in the market-place of Dumfries, though not on the regular market-day, was held sufficient.[2] And the transacting business in the Commercial Bank of Aberdeen, situated in one of the principal streets of the city, and making purchases in two shops in the vicinity, were held equivalent to attendance at market.[3] Attendance unsupported at an election[4] or racing meeting,[5] or at any similar concourse of people, is sufficient evidence of convalescence.

SECTION II.

Of the Deeds liable to challenge ex capite lecti.

Objection of deathbed applies to all deeds prejudicial to the heir. Testamentary dispositions.

348. I. Gratuitous Dispositions and Provisions.—The general rule is, that no deed granted or act done spontaneously on deathbed, to the prejudice of the heir, will be sustained if challenged by the heir, or by those in his right.[6] The rule excludes deeds which the party was under an obligation to grant; and deeds which, although disposing of the succession, are not prejudicial to the interests of the heir; as, for example, where the reduction of the deathbed deed would have the effect of opening the succession to a beneficiary under a prior deed. It is immaterial whether the right to be vindicated was vested in the person of the ancestor or in trustees for his behoof, provided it is heritable as to succession. The law of deathbed is in an especial manner directed against testamentary dispositions. It is not enough that a settlement executed on deathbed should be supported by rational considerations. In order that the deed may be within the exception, it must be in fulfilment of an antecedent obligation which might be made effectual by adjudication.[7]

Deeds of provision in favour of widows and younger children.

349. When a widow has by law a right of terce out of an estate, a conventional provision in her favour by her husband, as proprietor of that estate, is effectual to the extent of such terce. The

[1] *Earl of Rosebery* v. *Primrose*, 1736, M. 3322; Elch. "Deathbed," No. 8.

[2] *M'Cracken* v. *Pearson*, 14 Sept. 1821, 2 Mur. 551.

[3] *Rait* v. *Rait*, 27 Nov. 1818, F.C.

[4] *Lady Scotston* v. *Drummond*, 1694, M. 3322.

[5] *Laird* v. *Kirkwood*, 1763, M. 3315. On the other hand, in a comparatively recent case, attendance at a county meeting, and at a meeting of road trustees, were not admitted as equivalents to market; *Maitland* v. *Maitland*, 16 May 1815, F.C. Such meetings, however, are distinguishable from racing meetings and the like, to which the public at large are accustomed to resort.

[6] 1 Bell, Com. 7th ed. p. 88.

[7] See the case of *Jack* v. *Jack*, 20 May 1857, 19 D. 747, on the question whether a disponee, under a deed purporting to be onerous, may found upon the conveyance in his favour to the effect of maintaining it as a security or satisfaction of a prior debt.

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reason is, that to that extent the provision is not prejudicial to the heir.[1] But where the right to terce is excluded by the entail or deed of provision regulating the succession to the estate, which it may be where the clause of exclusion is a condition of the grant,[2] any conventional provision which an heir in possession may grant to his widow under the powers of the entail is obviously a gratuitous alienation to the prejudice of the heir, and is liable to reduction *ex capite lecti*.[3] Provisions to widows and children granted on deathbed are, moreover, effectual when within the amount which the granter was bound to provide by his contract of marriage;[4] otherwise they are incapable of being enforced against the heritable estate.[5] With reference to the rights of the heir, it is immaterial whether such provisions are contained in testamentary settlements or are constituted by bond of provision or deed *inter vivos*. But it would seem that a provision by deed *inter vivos* is effectual when executed in *liege poustie*, though it should not be delivered until the granter is on deathbed.[6] The heir is entitled to relief against an indirect alteration of the succession upon deathbed, *e.g.*, where a charter, containing a new destination, is obtained from the superior, or where estate is purchased in *liege poustie*, and the purchaser obtains a title on deathbed containing a destination in favour of a younger son.[7]

Deeds indirectly affecting the heritable succession.

350. Bonds secluding executors cannot be assigned upon deathbed to the prejudice of the heir.[8] Legacies and provisions granted *in lecto* are not only incapable of being made to affect the heritable estate, but the heir may prevent the executor from paying them, in so far as such payments may tend to reduce the fund for payment of moveable debts to the prejudice of his right of relief.[9]

351. II. Onerous Dispositions.—The principle in such cases

[1] Stair, 3, 4, 39; Ersk. 3, 8, 99; *Schaw* v. *Calderwood*, 1688, M. 3196; *Strachan* v. *Baldwin*, 1736, M. 3227; *Hay Newton's* case, *infra*, *per curiam*.

[2] *Gibson* v. *Reid* (*Hoselaw*), 1794, M. 15,869.

[3] *Hay Newton* v. *Hay Newton*, 18 July 1867, 5 M. 1056; affd. May 9, 1870, 8 M. (H.L.) 67. The proposition stated in the text is, of course, equally applicable to children's provisions, and it was so applied in the case.

[4] *Edmonstone* v. *Edmonstone*, 1706, M. 3219.

[5] *Boyack* v. *Foreman's Trs.*, 4 June 1729, 7 Sh. 704; *Riddell* v. *Richardson*, 1637, M. 3212; *Foulis* v. *Foulis*, 1721, M. 3223; *Leslie* v. *Leslie*, 1747, M. 3229; *Logan* v. *Campbell*, 1757, M. 3230.

[6] 1 Bell, Com. 7th ed. p. 89, citing *Shorwood's Children* v. *Shorwood*, 1669, 1 Br. Sup. 597.

[7] *Lindsay* v. *Lindsay*, 2 Dec. 1819, Hume, 156.

[8] *M'Kay* v. *Robertson*, 1725, M. 3224; *Murray* v. *Borthwick's Trs.*, 1797, M. 3237.

[9] *Shaw* v. *Gray*, 1624, M. 3208. The plea of deathbed was stated in the case of *Ewen* v. *Ewen's Trs.*—a reduction of a settlement of personalty,—but the decision does not seem to have been rested on that ground: see the reports in 2 Sh. 612, N.E. 522, 1 W. & S. 595, 6 Sh. 479, and 17 Nov. 1830, 4 W. & S. 346. See also *Earl of Leven* v. *Montgomery*, 1683, M. 3217, and *Cowie* v. *Brown*, 1707, M. 3220.

is, that the heir may have the deed set aside on condition of refunding the consideration money.[1] If the price had been invested in heritable securities, and the transaction is a fair one, the heir loses nothing, and he may, if he pleases, hold the purchaser to his bargain. If the price is extant in the form of money or personal estate, the heir will have relief against the executors; but the right of relief would not, as we think, extend to any part of the price which had been consumed by the ancestor in the course of his ordinary expenditure; for that is not an alienation to the prejudice of the heir, but a deterioration of the subject.

Heir's right of challenge conditional on his refunding the consideration money.

352. It may be suggested for consideration whether the right of the heir to reduce a sale of land in respect of deathbed is absolute, or is confined to cases where he is in a position to prove lesion or fraud. On this subject, the *dicta* of Erskine[2] and Bell[3] are unsatisfactory, and their distinctions unsubstantial. But neither of these eminent writers asserts that the heir has an absolute right to challenge a sale for a fair price; and the existence of such a right has not, so far as we are aware, ever been affirmed by a decision of the Court. We therefore feel warranted in stating the law to be, that a purchaser can only be dispossessed where the heir is able to show unfairness in the transaction.[4] With regard to the terms on which reduction is granted, Professor Bell[5] distinguishes the following cases: (1) If the ancestor has died with the price unpaid, a bond granted for it, or bills in his repositories, the heir will have his challenge on discharging the price or cancelling the bond or bills; (2) If the purchaser has been favoured to the heir's prejudice, reduction is competent on restitution of what has been paid; (3) Where the purchaser has granted bond or bill to younger children, this is an indication of *mala fides* sufficient to support a reduction; but the heir must repay to the purchaser the sum disbursed, or relieve him of the obligations granted to the younger children;[6] (4) Where the price has been paid to the ancestor, the heir, as his representative, must indemnify the purchaser as a condition of the decree of reduction, and seek his remedy against his ancestor's executors or grantees.[7]

Whether heir is bound to prove unfairness in the transaction.

353. The creation of burdens or securities is a virtual alienation, but the heir can always disburden the estate of a security by paying the debt; and, as a reduction would only be granted on

Security transaction. Heir's true remedy is against the executors.

[1] Ersk. 3, 8, 97; 1 Bell's Com. 7th ed. p. 87.

[2] Ersk. 3, 8, 97.

[3] 1 Bell's Com. 7th ed. p. 88.

[4] See, on the subject of reduction of sales, the cases of *Gilbert*, 1608, M. 3290; *Campbell* v. *Rankin*, 1805, M. "Deathbed," App. No. 5, 5 Pat. 573; *Richardson and Riddel* v. *Sinclair*, 1635, M. 3210.

[5] Bell's Com. *ut supra*.

[6] *Richardson and Riddel* v. *Sinclair*, *supra*.

[7] *Gillespie* v. *Gillespie*, 18 June 1802, Hume, 145.

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similar terms, it does not appear that the element of deathbed makes any difference in questions between heirs and heritable creditors. The true remedy is by an action against the executor for repayment of the loan as heritage converted contrary to the law of deathbed. In the case of heritable bonds granted *in lecto* in security of prior debts, it has been held that the heir has no action against the heritable creditor.[1]

Leases how far reducible *ex capite lecti*.

354. Leases exceeding the ordinary term of duration are reducible *ex capite lecti*,[2] but where granted in the exercise of a due course of administration they are not reducible.[3] Where a grassum is taken on deathbed it is challengeable, according to Professor Bell, in so far as the money is given to executors to the prejudice of the heir; but it is apprehended that an action could not be maintained against the tenant to the effect of compelling him, without restitution of the grassum, to pay the full rent.[4] A sale of growing timber has been sustained as an act of ordinary adminstration in a question with the purchaser.[5]

Discharges of heritable securities not reducible.

355. In a question between heir and executor, the assignation of an heritable debt by the ancestor on deathbed is the same in principle as a sale of land; but the rule does not extend to the extinction of securities by discharge; for, according to the judgment in an early case, "though one be restrained from conveying an heritable debt on deathbed in prejudice of his heir, he may take payment thereof on deathbed, and so dissolve the obligation he could not transmit on deathbed."[6]

SECTION III.

TITLE TO CHALLENGE EX CAPITE LECTI.

General rule as to title.

356. The rule is, that the title to pursue a reduction belongs to the heir who, but for the deathbed deed, would be entitled to make up a title to the subjects as heir-at-law or of provision.

Title of the heir-at-law.

357. The heir-at-law, whether of line or of conquest, is entitled to challenge a deathbed deed unless his title is excluded by an antecedent disposition.[7] And where the nearest apparent heir dies

[1] *Shaw* v. *Gray*, 1624, M. 3208; *Pollock* v. *Fairholm*, 1632, M. 3209; *Darling* v. *Hay*, 1709, M. 3222.

[2] *Christison* v. *Kerr*, 1733, M. 3226; *Bogle* v. *Bogle*, 1759, M. 3235.

[3] *Semple* v. *Semple*, 1 June 1813, F.C.

[4] 1 Bell, Com. 7th ed. p. 89.

[5] *Maxwell* v. *Corrie*, 1724, M. 3329.

[6] *Elies* v. *Watson*, 1712, M. 16,930; *Brown* v. *Thomson*, 1634, M. 3200.

[7] The test of the title to challenge is the possibility of the heir succeeding to the estate if the deed in question were reduced. Thus, in *Grant* v. *Grant's Trs.*, 2 Dec. 1859, 22 D. 53, where a father had made up a title as heir-at-law to his son, and ratified his disposition to a third party, it was held that a daughter, afterwards born, had no title to challenge her brother's disposition.

without making up a title, the right of challenge passes to the next heir,[1] even though the heir dying in apparency is *alioqui successurus*, and has no interest to challenge.[2] Thus, where a truster left his whole estate in the first place to his eldest son, and failing him by death in minority, appointed it to be distributed among various legatees, and the institute took benefit under the trust and died in minority, the truster's nephew and the next heir was held entitled to reduce the settlement *ex capite lecti;* but the judges were of opinion that, if the intestate had attained majority, his approbation of the settlement would have barred reduction at the instance of a remoter heir.[3] But in special circumstances, where a settlement for distribution was expressly ratified by the eldest son and apparent heir of the truster, the next heir was held to be barred from reducing the settlement *ex capite lecti.*[4]

Title of the heir of provision.

358. The heir of provision, whether by tailzie, marriage-contract, or destination in the investiture,[5] whether nominated by the maker of the deathbed deed,[6] or by a remoter ancestor, is entitled to pursue for reduction on this ground, and that even where the person favoured by the deathbed deed is the heir of line;[6] the principle being, that the order of succession, as settled by law or deed previous to deathbed, is not to be altered on importunity during that period of weakness.[7] An heir of provision is not required to complete a title by infeftment to qualify himself to institute a reduction.[8] The heir-substitute under an imperfect entail or deed of simple destination has therefore a good title to challenge an alteration of the succession by deed executed on deathbed, whether made by the institute under the destination or by a prior substitute.[9] And it is no objection to his title to reduce, that the granter of the deathbed deed was expressly authorised to alter the destination, for the ground of reduction is not the want of power,

[1] *Craig* v. *Maltmen of Glasgow*, 1739, M. 3199.

[2] *Kennedy* v. *Arbuthnot*, 1722, M. 3198.

[3] *Irvine* v. *Tait*, 3 June 1808, M. "Deathbed," App. No. 6; *Hedderwick* v. *Campbell*, 1740, Elchies, "Deathbed," No. 13.

[4] *Leith* v. *Leith*, 6 June 1848, 10 D. 1137.

[5] *Hepburn* v. *Hepburn*, 1663, M. 3177; *Porterfield* v. *Cant*, 1672, M. 3179; *Howie* v. *Merry*, M. "Writ," App. No. 3, 17 March 1806, 5 Pat. 101, and cases cited *infra*.

[6] See *Crawford* v. *Coutts*, 14 March 1806, 5 Pat. 73, where the contention lay between the heir-at-law and the heir of provision under a previous deed of the deceased, and the title of the latter to sue as an heir of provision was admitted to be incontestable, the only question being as to the effect produced by an express revocation of the prior deed.

[7] 1 Bell, Com. 7th ed. p. 92.

[8] *Porterfield* v. *Cant*, *supra*; *Marquis of Clydesdale* v. *Earl of Dundonald*, 1726, M. 3180.

[9] *Cogan* v. *Lyon*, 4 Dec. 1830, 4 W. & S. 391; *ibid.*, 28 Jan. 1832, 10 Sh. 267. In the first case the pursuer failed because he had erroneously described himself as heir of provision to the settlor when he should have been designed heir of provision to the institute, by whom the succession was altered on deathbed.

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but the presumed want of capacity or of firmness on the part of the granter of the deed.[1] A prior effectual alteration of the settlement may be pleaded by the disponee under the deathbed deed to exclude the title of the heir of the subsisting settlement.[2]

Reduction *ex capite lecti*, whether competent to a disponee?

359. No case has been found in which it was held that a person claiming as institute, or immediate disponee of the defunct under a prior settlement, would not have a title to reduce a subsequent deed of settlement executed on deathbed to his prejudice; and though there is a general understanding that the remedy is confined to proper heirs of provision, the case of *Merry* v. *Howie* is a direct authority in favour of the title of a disponee.[3] In one case it was observed that the right of challenge in respect of deathbed only belongs to heirs whose titles fall to be completed by service;[4] a definition which would include an heir who is a first taker, but who, in respect of his not being named in the deed, but merely designed as heir, requires a service to establish his relationship. Legatees and beneficiaries under trust-settlements of heritable estate have been held to have no claim to the character of heirs of provision in a question of title to reduce.[5] Claimants under marriage-contracts are in the same position; but, as they are creditors in a question with heirs, they have a remedy by action against the heir in his representative character.[6]

Title of an apparent heir.

360. It is said by Professor Bell, on the authority of an early case, that the privilege of reduction *ex capite lecti* is competent to an heir-at-law possessing on apparency.[7] It has been doubted whether this privilege can be exercised by an heir of provision who has not made up a title.[8] There does not appear to be any solid distinction between the two cases. As a matter of fact, it is believed that where the fact of deathbed was notorious, the heir not infrequently made up his title by service or entry with the superior,

[1] *Pattison* v. *Dunn's Trs.*, 9 March 1866, 4 M. 555, 6 M. (H.L.) 147; and see *M'Ewen* v. *Pattison*, 27 March 1865, 3 M. 779.

[2] *Duke of Hamilton* v. *Douglas*, 27 March 1779, 2 Pat. 449.

[3] *Howie* v. *Merry*, 1801, M. "Writ," App. No. 3; 17 March 1806, 5 Pat. 101. The pursuer, who successfully maintained his title to set aside the deed, was one of two joint disponees under a previous settlement of the same person. But see Ersk. 3, 8, 98.

[4] *Shaw* v. *Campbell*, *infra*, per Lord Medwyn. It need scarcely be observed that in the case of a disposition to the grantee himself, and other persons named in succession, the grantee is the institute, and the first taker after him an heir of provision. Such an heir would have a clear title to reduce a deed of alteration. The observations in the text apply to the case of direct dispositions to heirs, reserving the granter's liferent.

[5] *Shaw* v. *Campbell's Exrs.*, 2 March 1847, 9 D. 782; and see *Morison* v. *Morison*, 12 Feb. 1808, Hume, 147.

[6] *Maxwell* v. *Neilson*, 1722, M. 3194; *Campbell* v. *Campbell*, 1738, M. 3195.

[7] 1 Bell, Com. 7th ed. p. 92, citing *Graham* v. *Graham*, 1779, M. 3186.

[8] Compare *Graham* v. *Graham*, *supra*, where the heir-at-law was also heir of investiture, with *Edmonston* v. *Edmonston*, 1637, M. 16,089.

without taking the trouble to cut down the deathbed deed. In a case where this was done by an heir who was also a trustee under the deathbed deed, it was held that his act was neither fraudulent nor inconsistent with his duty as a trustee.[1] Where a written title is necessary, a general service not followed by an entry from the superior has been considered insufficient.[2]

Heir's right adjudgeable by creditors.

361. During the lifetime of the heir, and within the period of prescription, his right of challenge may be made available to his creditors either by adjudication or by direct action libelling on their right as creditors. "This," says Professor Bell, "seems to rest on the ground that the creditors may competently have a declarator that their debts should have free course to attach the estate unobstructed by the deathbed deed."[3] The husband of an heiress cannot institute a reduction *ex capite lecti* in her name without her consent.[4] The donatory of the Crown has a title to insist in an action of reduction on this ground.[5] The right of an heir duly entered passes to his representatives,[6] but that of an apparent heir of course dies with him, if it is not made effectual in his lifetime.

Other titles.

Ratification by the heir; whether effectual in a question with creditors.

362. An heir may elect to ratify a deathbed deed, and having done so, he has exercised his option, and there is no longer any right of challenge capable of being attached by creditors or transmitted to heirs.[7] This, of course, is stated on the assumption that the ratification has been made in good faith; for if the heir should gratuitously ratify a deed to his prejudice while in a state of insolvency, his creditors may have the transaction set aside under the powers of the Statute 1621, cap. 18; or, if the person favoured by the deathbed deed be a creditor of the heir, and the effect of the ratification is to constitute a preference in his favour, reduction will be competent under the Act 1696, cap. 5, or at common law. Ratification may either be by express deed or by tacit homologation.[8] In the former case, the construction of the deed is for the Court,[9] in the latter the question is one of evidence, which may be left to a jury.[9] Mere lapse of time, even to the extent of seventeen

[1] *Thain* v. *Thain*, 1891, 18 R. 1196.

[2] 1 Bell, Com. 7th ed. p. 92.

[3] Com. *ut supra*; Ersk. 2, 12, 6, and 3, 8, 100; *Balmerino's Crs.* v. *Lady Couper*, 1669, M. 3203.

[4] *Greenhill* v. *Aitken*, 15 Feb. 1826, 4 Sh. N.E. 478; *Aitkens* v. *Orr*, 1802, M. 16,140. The privilege, therefore, does not fall under the *jus mariti*, but is analogous to the case of electing between legal and conventional provisions, where the wife is held to have a personal right of choice, preferable to that of her husband or his creditors; see *Lowson* v. *Young*, 15 July 1854, 16 D. 1098; and *Stevenson* v. *Hamilton*, 7 Dec. 1838, 1 D. 181.

[5] *Brock* v. *Cochrane*, 2 Feb. 1809, F.C.

[6] See *Smith* v. *Shields*, 18 Feb. 1830, 8 Sh. 553.

[7] *Leith* v. *Leith*, 6 June 1848, 10 D. 1137.

[8] Under the Act 1621, cap. 18, the testator's creditors will also have a remedy against deeds prejudicial to their just rights; *Lindsay's Crs.*, 1714, M. 3204.

[9] *Richardson* v. *Richardson*, 8 March 1848, 10 D. 872; *Murray* v. *Murray's Trs.*, 21 Jan. 1826, 4 Sh. 374, N.E. 377.

years,[1] or, as in another case, twenty years,[2] is not conclusive on the question of homologation. A deed executed on deathbed may be ratified at the time, but the signature of the heir as witness does not import approbation of the contents.[3] Homologation will not easily be inferred where the heir was ignorant of his legal rights, and any unfair practice or dissimulation on the part of those interested in obtaining a ratification of a deathbed deed will usually be fatal to the transaction.[4] A deed of ratification executed on deathbed was held not to be challengable on that ground.[5] As the effect of reducing a deed of settlement *ex capite lecti* is to defeat the intention of the testator in all cases where actual incapacity is not proved, the law of approbate and reprobate is applicable. The heir is held to repudiate the settlement if he brings it under reduction on this head, and consequently he is barred from claiming any interest in the moveable estate under its provisions.[6]

SECTION IV.

Exclusion of the Heir's Title and effect of Revocation.

Privilege of reduction cannot be renounced in the ancestor's lifetime.

363. (1.) It has been seen that a settlement executed on deathbed may be ratified or homologated by the heir after the ancestor's death.[7] It has been settled by a series of judicial decisions that the privilege of reduction on the head of deathbed cannot be renounced in the ancestor's lifetime.[8] "The heir," says Mr. Erskine, "can by no antecedent general writing renounce his right of reduction, and thereby give validity to all dispositions that may be afterwards granted *in lecto* to his hurt; for few heirs, for fear of being disinherited, would dare refuse to sign such renunciations."[9] But, in the opinion of the same author, and of Mr. Bell, the heir's assent to a particular deed, if fairly obtained, bars his right of challenge in the event of the granter dying within the sixty days;[10] and in

[1] *Brodie* v. *Brodie*, 6 July 1827, 5 Sh. 835.

[2] *Gardner* v. *Gardner*, 3 Dec. 1880, 9 Sh. 138. On the point of *bona fide* possession see *Moir* v. *Mudie*, 16 June 1826, 4 Sh. 725, N.E. 731.

[3] Ersk. 3, 3, 48; *Dallas* v. *Paul*, 1704, M. 5677.

[4] See *Murray* v. *Murray's Trs.*, 21 Jan. 1826, 4 Sh. 374, N.E. 377.

[5] *Cleugh* v. *Leslie*, 1744, M. 3182. The effect of this decision is misapprehended by Bell, 1 Com. 7th ed. p. 93. The report states that "the Lords assoilzied from the reduction."

[6] *Loudon* v. *Loudon*, 1811, 1 Sandford on Heritable Succession, p. 145; *Ladies E. and M. Ker* v. *Duke of Roxburgh's Trs.*, 23 Nov. 1815, Hume, 25; 5 May 1819, 1 Bligh, 1.

[7] *Supra*, § 357.

[8] *Inglis* v. *Hamilton*, 1733, M. 3327, Elch. "Deathbed," No. 1; *Reid* v. *Campbell*, 1728, M. 3327; *Irving* v. *Irving*, 1744, M. 3332; *Murray* v. *Murray's Trs.*, 21 Jan. 1826, 4 Sh. 374, N.E. 377.

[9] Ersk. 3, 8, 99.

[10] Ersk. *ut supra*; 1 Bell, Com. 7th ed. pp. 90-91.

the absence of any adverse authority, their opinions would probably be held to fix the law.[1]

Deeds in the exercise of powers of disposal not reducible *ex capite lecti.*

364. (2.) Dispositions granted in the exercise of a power of disposal given by a proprietor to a person who is not the absolute proprietor of the estate are not subject to the operation of the law of deathbed. The law of deathbed contemplates the protection of *the heir of the granter* against deeds granted to his prejudice; but, in the case supposed, the granter is not the proprietor, and his heir would take nothing by the reduction of the deathbed deed. Where, therefore, estate is given to one person in liferent and to another in fee, subject to a power of disposal on the part of the liferenter, the exercise of that power is not challengeable *ex capite lecti.*[2] And if a proprietor convey his estate to his son in his lifetime, reserving his own liferent, together with a power to burden or dispose,[3] or settle his estate in strict entail, reserving only a liferent and power to burden,[4] the exercise of such reserved powers, by granting provisions to younger children, is not liable to challenge under the law of deathbed. The distinction is obvious between such cases and the attempted reservation of a power to dispose *etiam in articulo mortis* by a person who retains the fee of his estates, or such powers as the law holds to be equivalent to a fee. It is an inflexible rule that a proprietor cannot, by direct reservation of a power, obtain the capacity of disposing of his estate on deathbed. This rule applies even to the case of a proprietor who has divested himself of some of the powers of a fiar by executing and recording a deed of entail of his estates; and in such a case, where the entailer was constituted the institute or disponee under the deed of entail, and subsequently on deathbed granted to his widow and younger children certain provisions, being in the exercise of the powers of the entail, those provisions were held to be reducible at the instance of the heir of entail.[5]

Deeds of revocation not reducible: effect of this rule.

365. (3.) The revocation of a voluntary settlement is not challengeable under the law of deathbed.[6] The reason is, that a mere

[1] In the case of *Murray* v. *Murray*, *supra*, the Court reduced a ratification of a deathbed deed under which the heir was to receive £400 in place of £10,000; but the judgment was rested on the unfairness of the transaction, and the pursuer's ignorance of his legal rights at the time of entering into it. See on this point *Murray* v. *Kinloch*, 29 Mar. 1739, 1 Cr. St. & Pat. 245.

[2] *Somervell* v. *Geddie*, 1743, Elchies, "Deathbed," No. 16; *Morris* v. *Tennant*, 7 June 1853, 15 D. 716; 6 July 1855, 18 D. (Ap. Ca.), 42; 27 Jur. 546.

[3] *Pringle* v. *Pringle*, 29 Jan. 1767, 2 Pat. 130, reversing M. 3287.

[4] *Forbes* v. *Forbes*, 29 Jan. 1756, 2 Pat. 8, reversing M. 3281; cited, along with the case of *Pringle*, by the Lord President in *Morris* v. *Tennant*.

[5] *Hay Newton* v. *Hay Newton*, 18 July 1867, 5 Macph. 1056; affirmed 9 May 1870, 8 M. (H.L.) 67.

[6] Ersk. 3, 8, 98; *Coutts* v. *Crawford*, 14 March 1806, 5 Pat. 73; *Mudie* v. *Moir*, 1 March 1824, 2 Sh. (Ap. Ca.), 9; *Whitelaw* v. *Lang*, cited in a note to *Mudie's* case, p. 13; *Millar* v. *Marsh*, *infra*.

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revocation in its direct operation[1] is not prejudicial to the rights of an heir, whether of line or of provision, while in some cases it may operate in his favour, by displacing the deed or deeds which excluded him from the succession. The rule is illustrated by the case of *Miller* v. *Marsh*,[2] where an entailer was held entitled by a deed executed on deathbed to convert a tailzied succession into a simple destination, by merely revoking the restraining clauses of the deed of entail. The effect of this proceeding was to raise the interest of the institute to a fee-simple estate, and to reduce that of the heirs-substitute from a vested interest to a mere expectancy; yet, as the object was accomplished by *revocation*, the heir was held to have no title to reduce. In this case the revocation was made under a reserved power; but it would seem that when a deed is in its nature revocable, the non-reservation of a power to revoke would not affect the granter's right of revocation upon deathbed.

Effect of revocation combined with new settlement.

366. (4.) A deed of alteration, or codicil to a settlement, if it is anything more than a simple revocation, total or partial, of the provisions of the settlement, is to the extent of the alteration a new disposition. By the law of deathbed, the dispositions contained in a deed of alteration or new settlement are liable to reduction at the instance of the heir of provision of the previous settlement in *liege poustie*; or, if there be no heir of provision, then at the instance of the heir-at-law. But here it is necessary to distinguish the case of a settlement in favour of heirs of provision not *alioqui successurus* from that of a disposition to the heir-at-law. For, by an extension of the rule already noticed in relation to deeds executed under powers, the doctrine has been recognised that, in the case of a settlement *in favour of a stranger*, the reservation of a power to alter or revoke on deathbed is effectual as a condition of the grant; so that its exercise cannot be challenged by the disponee or heir of provision.[3] And it would seem that such reserved powers may be

[1] That it may be indirectly prejudicial to the interests of the heir of line is sufficiently obvious, *e.g.*, where under the revoked deed he is entitled to the succession, and the effect of the deed of revocation is to revive a previously executed deed in favour of a stranger. The case of *Millar* v. *Marsh*, *infra*, is an example of a deed of revocation operating indirectly to the prejudice of the heir of provision.

[2] *Millar* v. *Marsh*, 15 D. 823; 22 May 1855, 2 Macq. 284.

[3] Ersk. 3, 8, 98; 1 Bell, Com. 7th ed. p. 90; *Livingstone* v. *Menzies*, 1705, M. 3261. In addition to these authorities, we cite the observations on this point in Lord Eldon's instructive judgment in *Crawford* v. *Coutts*:—"It is admitted that if a valid *liege poustie* deed existed at the death of the granter, the deathbed deed would also be good. It is to be observed, however, that this *liege poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. This is obvious in principle; the stranger disponee is bound to hold good any power reserved against him; if such power be duly executed, he cannot complain" (5 Pat. 95). See Lord President Campbell's opinion to the same effect, reported 5 Pat. 74-75.

exercised upon deathbed though the words *etiam in articulo mortis* are not used, provided there is no limitation of time expressed in the power.[1] But in the case of a settlement in favour of an *heir-at-law*, as his right is not derived from the disposition in his favour, neither is it controlled by the conditions of the settlement. The most positive reservation of a power to burden or dispone *etiam in articulo mortis* in a disposition to the heir, is wholly inoperative as regards the heir's right of challenge, and is of no effect in validating any subsequent deathbed deed.[2]

Effect of trust for purposes undeclared.

367. Nor is it possible to give validity by anticipation to a deed to be executed *in articulo mortis* by conveying the estate to trustees in *liege poustie*, leaving the purposes to be declared in the deathbed deed. A conveyance for purposes undeclared is truly a resulting trust for the heir-at-law; and such a settlement is in legal effect precisely the same as one in favour of the heir-at-law, with a reserved power of alteration.[3] The same principle governs the decisions of those cases in which it has been unsuccessfully attempted to retain the power of disposal on deathbed by executing a deed blank in the name of the disponee, and filling it up upon deathbed.[4] The principle of resulting trust requires that the name of the heir-at-law should be read into the blank. And where in a trust-settlement in favour of a stranger, with reserved powers of alteration, the trust lapses through the predecease of the beneficiary, a resulting interest accrues to the heir-at-law, which cannot be defeated by deed or codicil executed upon deathbed.[5]

[1] Ersk. *ut supra; Buchanan* v. *Buchanan*, 1758, M. 3285; per Lord Justice-Clerk Hope in *Shaw* v. *Campbell's Exrs.*, 9 D. 787. But a general power of altering the succession given to a disponee does not imply that the alteration may be made upon deathbed; *Pattison* v. *Dunn's Trs.*, 9 Mar. 1866, 4 Macph. 555. Lord Justice-Clerk Inglis was of opinion that such a power might have been effectually given by means of a condition,—*i.e.*, by providing that the substitution contained in the original settlement should *not* take effect if the institute conveyed the estate *in lecto*. But, *quære*, would not this let in the institute's heir-at-law?

[2] *Hepburn* v. *Hepburn*, 1663, M. 3177; *Davidson* v. *Davidson*, 1687, M. 3255; *Bertram* v. *Vere*, 1706, M. 3258. In *D. of Hamilton* v. *Douglas*, 2 Pat. 449, a challenge at the instance of an heir of provision under a prior deed was held incompetent, in respect that the deed challenged was granted in pursuance of a reserved power.

[3] *Wauchope* v. *Ladies E. and M. Ker*, 21 Feb. 1812, 5 Pat. 559. Here the residue was directed to be held in trust for such persons as the truster should appoint; and the appointment, having been made on deathbed, was held ineffectual. *Erskine* v. *Erskine's Trs.*, 3 Dec. 1840, 13 D. 223. In this case the purposes relating to the disposal of the truster's heritable estate were recalled by a codicil executed in *liege poustie*, thus letting in the heir's resulting interest; and a subsequent codicil, directing a distribution of the heritage, was reduced on the head of deathbed.

[4] *Pennycook* v. *Thomson*, 1687, M. 3243; *Birnies* v. *Laird of Polmais*, 1678, M. 3242, 3 Br. Sup. 325.

[5] *Clyne* v. *Clyne's Trs.*, 12 May 1837, 15 Sh. 911; 18 Mar. 1839, M'L. & Rob. 72. It will be observed that the objection to trusts for uses and purposes to be afterwards declared, only arises in the event of the subsequent explanatory deed or will being liable to objection on the

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Effect of reserved power to revoke, coupled with a destination-over, in case of ineffectual exercise of the power.

368. (5.) We now see that it is possible to give validity by anticipation to a deathbed deed of appointment, and that this may be accomplished by executing a settlement in *liege poustie*, containing a power to appoint at any time, with a destination-over to beneficiaries other than the heir in default of appointment. Such beneficiaries, not being proper heirs of provision, would not have a title to reduce a deed of alteration subsequently executed. But their interest might be pleaded by the deathbed disponee as being a preferable right to that of the heir-at-law, and therefore sufficient to exclude him. The effect of this is best seen in examples. In the case of *Ker* v. *Lady Essex Ker's Trustees*,[1] a testatrix, by deed executed in *liege poustie*, conveyed her heritable estate to trustees, with directions to sell and to pay legacies, &c., and finally to pay over the residue to such persons as she would direct by any writing under her hand, and in default of such writing, to pay over the residue to her next of kin, according to the law of England; and she thereafter, upon deathbed, executed a memorandum of directions to trustees disposing of the residue of her said estate. On a challenge of this instrument at the instance of the heir-at-law, it was held that, as the reduction of the memorandum of directions *ex capite lecti* would occasion the default in the event of which the property was to go to the next of kin, the heir was barred, by want of interest, from maintaining the challenge.[2] If the reduction would not benefit the heir, but would only have the effect of setting up a different deed in favour of parties other than the heir, then the heir has neither title nor interest to insist in the challenge.[3]

Effect of clause of revocation conditional on new settlement proving effectual.

369. (6.) The unconditional revocation in express words of a previously executed testamentary disposition has the effect of reviving the right of the heir, and with it the power of challenging deeds executed on deathbed to his prejudice.[4] And where such a

ground of deathbed. Where both deeds have been executed in *liege poustie*, they will be construed as one settlement; *Willock* v. *Auchterlony*, 3 Pat. 659; *Brack* v. *Hogg*, 6 Sh. 113.

[1] *Ker* v. *Lady Essex Ker's Trs.*, 1 Oct. 1831, 5 W. & S. 718. The case is previously reported in 3 Sh. 530, N.E. 367; 7 Sh. 454; and 8 Sh. 694.

[2] The rule has been applied even in cases where the first executed settlement did not expressly contemplate and provide for the case of the failure of a subsequent attempt to alter its provisions. See the cases of *D. of Roxburghe* v. *Wauchope* and *Stewart* v. *Neilson*, *infra*; *E. of Strathmore* v. *Strathmore's Trs.*, 23 Mar. 1831, 5 W. & S. 170, affirming 8 Sh. 530.

[3] *Barstow* v. *Black and Ors.*, 1868, 6 M. 147. The case of *Wyllie* v. *M'Bride* goes somewhat beyond the reason of this rule, for it was there held sufficient to bar the heir's title, that the prior instrument (although not excluding him) cut down his interest to a liferent, 18 R. 223. Compare *Gray* v. *Gray*, 1872, 10 M. 854.

[4] 1 Bell's Com., 7th ed. p. 91; *Findlay* v. *Birkmire*, 1779, M. 3188; *Stewart* v. *Neilson*, 3 Feb. 1860, 22 D. 646; *Erskine* v. *Erskine's Trs.*, 3 Dec. 1850, 13 D. 223.

revocation is combined with a new disposition of the estate, but the revocation is not expressly made conditional on the subsistence of the new disposition,[1] the same effect follows,—the revocation is effectual; and the heir, being no longer excluded by a subsisting disposition, is entitled to avail himself of his right of challenge *ex capite lecti* to cut down the new disposition.[2] This result has been held to follow even where there is substantial identity between the provisions of the revoked and the revoking settlements.[3] But where the revocation, whether in the same or in a separate deed, is expressed to be conditional, and the previously executed disposition is declared to be effectual in the event of the new disposition proving ineffectual, the heir will be debarred of his challenge.[4]

Effect of new settlement where previously executed settlement is not expressly revoked.

370. It has been seen that in certain cases the interest of the grantee under a disposition executed in *liege poustie* is sufficient to bar the heir's right of challenge, such disposition not being expressly revoked by a subsequently executed will or disposition. It may now be added that the implied revocation of a disposition made in *liege poustie*, which results from the execution of a subsequent inconsistent disposition on deathbed, does not operate in favour of the heir. Implied revocation, which arises from the necessity of reconciling the provisions of two inconsistent dispositions, is admitted only when the subsequent disposition is effectual, and not where it is liable to the objection of deathbed. Where, therefore, a testator leaves the revocation of a previously executed settlement to be effected by legal implication, he is considered to have virtually declared that the subsistence of the second disposition shall be a condition of the revocation of the first. In such a case, it is obvious that the heir cannot qualify an interest to set aside the deathbed disposition.[5] When the heir is himself a beneficiary under the *liege poustie* disposition, it might be supposed that his title to reduce was not excluded by it, but was rather confirmed. But here the law of

Where heir is also a beneficiary.

[1] *Crawford* v. *Coutts*, 1795, M. 14,958, as reversed by Lords Rosslyn, Thurlow, and Eldon, 14 March 1806, 5 Pat. 73; *Battley* v. *Small*, 2 Feb. 1815, F.C.; *Moir* v. *Mudie*, 2 March 1820, F.C., 1 March 1824, 2 Sh. App. Ca. 9.

[2] The later cases of *Leith* v. *Leith*, 19 June 1863, 1 M. 949, and *Cameron* v. *West's Trs.*, 2 Feb. 1864, 2 M. 584, raise the interesting question, Whether the heir can found upon a revocation of an heritable provision for the purpose of challenging a new settlement of the estate, if the effect of a simple revocation would be to make the subject of the provision fall into residue? Upon principle it would seem that the interest of the residuary legatees is sufficient, in such a case, to exclude the heir.

[3] *Anderson* v. *Fleming*, 17 May 1833, 11 Sh. 612.

[4] *Lawrie* v. *Lawrie's Trs.*, 22 Jan. 1830, 8 Sh. 379; per Lord Eldon in *Crawford* v. *Coutts*, 5 Pat. 96; 1 Bell's Com. 7th ed. p. 91.

[5] *Ker* v. *Lady Essex Ker's Trs.*, *supra*; *Rowan* v. *Alexander*, 1775, 5 Br. Sup. 423, Hailes, 659; *Duke of Roxburgh* v. *Wauchope*, 13 Dec. 1816, F.C., 25 May 1820, 6 Pat. 548.

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approbate and reprobate interposes its regulating function for the protection of the ultimate intention of the testator, and declares that the deathbed disposition, though reducible as a conveyance, is effectual as a will. If, therefore, the heir insists for reduction of the deathbed conveyance, he shall have his decree, but only on the condition of surrendering to the uses of the will the provisions in his favour which are contained in the *liege poustie* disposition.[1]

Cancellation equivalent to express revocation in relation to deathbed.

371. (7.) The cancellation or physical destruction of a deed of provision executed in *liege poustie*, is equivalent to express revocation in relation to the rights of the heir, because a deed which is non-existent cannot be held to create an interest adverse to the heir's title to reduce a subsequent deathbed deed. But in a case where the prior deed had been cancelled without the granter's authority, and its provisions were so far similar to those of the subsequent deathbed deed that the two instruments were capable of standing together, the Court admitted the cancelled instrument in support of the other, and the House of Lords affirmed the decision.[2]

Cancellation of an undelivered deed of revocation revives previously executed settlement.

372. The cancellation or destruction of a deed of revocation is understood to have the effect of reviving the instrument which the cancelled deed purports to revoke. In this respect the effect of cancellation differs materially from that of a written revocation. The case of *Ker* v. *Erskine*[3] is an authority for the proposition, that where a settlement of heritable estate has been effectually revoked, even by a testamentary deed, a second deed of revocation, revoking the first, will not, if executed on deathbed, have the effect of reviving the settlement, so as to rear up a title preferable to that of the heir-at-law. Apparently the settlement is held as executed of the date of the deathbed deed by which it is revived, as a memorandum incorporated by reference in a will is held to be inserted in, and to bear the date and attestation of the incorporating instrument. "A deathbed deed," it was observed, "can operate no effectual conveyance of heritable property, or exclude the heir-at-law, unless he stands already effectually excluded by an existing settlement. The testator revoking his revocation, with the view of reviving an extinguished deed, cannot make it operative to the prejudice of the heir who had been excluded by the extinguished deed."[4] But by the physical destruction or cancellation *animo et facto* of a deed or revocation, everything thereby revoked will be as effectually revived as if the revocation had never been executed.

[1] *Black* v. *Watson*, 9 Feb. 1841, 3 D. 522.

[2] *Mure* v. *Mure*, 1 June 1813, F.C.; 9 June 1818, 6 Pat. 399.

[3] *Ker* v. *Erskine*, 16 Jan. 1851, 13 D. 492.

[4] 13 D. 405, per Lord President Boyle.

The deed of revocation being in the case supposed undelivered, can only become operative by being found in the maker's repositories at his death. If it has by the will of the maker ceased to exist in the form of a perfect and authenticated deed, it is of no more efficacy than a draft, nor can it be held to offer any impediment to the reception of the deeds which it purports to revoke as of their proper dates.[1]

[1] See *Howden* v. *Howden*, 8 July 1815, F.C.

CHAPTER X.

RIGHTS OF THE HEIR AND THE EXECUTORS DISTINGUISHED.

1. Corporeal Subjects, whether Heritable or Moveable.
2. Incorporeal Rights.
3. Conversion under an uncompleted Contract of Sale.
4. Apportionment of Rents and Termly Payments.

Division of the subject.

373. The general rule in relation to the distinction of Heritable and Moveable Succession is that which is pointed out by the legal character or quality of the estate: heritable estate descends to the heir; moveable estate to the executors. Estate may, however, in certain circumstances, descend to the heir, or to the executors, in a character different from that which naturally belongs to it. The topics to be treated under this chapter may be divided as follows: *first*, succession in relation to corporeal subjects; *second*, succession in incorporeal rights; *third*, conversion under uncompleted contracts of sale; and *fourth*, rights of heirs and executors in relation to termly payments at common law and under the Apportionment Acts.

SECTION I.

Corporeal Subjects, whether Heritable or Moveable.

Rules as to annexations to heritable estate, and severance.

374. In relation to corporeal subjects, the distinction of heritable and moveable in the law of Scotland corresponds substantially with the distinction of moveable and immoveable of the Civil Law and of general jurisprudence. With respect to what are included under the comprehensive term of "fixtures," two general rules have been established—(1) Whatever is fixed to the freehold of land becomes part of the freehold or the inheritance; (2) Whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which in the law of England is called waste, and which, according to the law of England and Scotland, is an offence which can be restrained. (3) To the first rule there is no exception, but to the second rule, as to the irremoveability of things fixed to the inheritance, an exception has been established in favour of the fixtures which have been attached to the inheri-

tance for the purposes of trade, and perhaps in a minor degree for the purpose of agriculture.[1] (4) To the complete elucidation of this subject it is necessary to introduce an additional proposition, which is, that where the question whether fixtures are included arises under a sale, contract, or testamentary writing, the primary question is, whether according to the agreement of parties, or, as the case may be, in the intention of the testator, the fixtures were included in the grant. In this question the fact of physical annexation is an element which may or may not be conclusive, according to the conditions of the case. Thus in *Tod's Trustees* v. *Finlay*,[2] a husband by contract of marriage made a gift to his wife of the household furniture (followed by an enumeration of things) "and other plenishing and effects, including heirship moveables, carriage and carriage horses, and other effects now belonging or that may be hereafter acquired by him, in so far as the same may form part of, or be situated, or used at, in, or in any way connected with his ordinary or principal residence and establishment." In the garden and ground pertaining to the granter's country residence he had erected (1) a conservatory and greenhouses; (2) extensive wire fences of an ornamental character; and (3) an observatory, containing a telescope and fitted with a revolving dome. It was held that none of those things passed, because the clause in the contract was an assignation of a limited character and for a limited purpose, and "related solely to effects intended for domestic use and enjoyment, whether in the way of utility or of ornament," their character as heritable and moveable being immaterial. But again, in *Cochrane* v. *Stevenson*, where the question was what was included in a contract of sale of a country house, it was held that pictures fitted as panels into the wainscot of a dining-room, and capable of being removed without injury to the immoveable subject, were not claimable by the purchaser, the case being treated as a mixed question of fact and of intention to convey.[3]

Rules apply to leasehold as well as to property in land.

375. Returning to the main question, the question of the right to fixtures has been simplified by the decision of the House of Lords in *Brand's* case, and the observations of Lords Cairns and Selborne will hereafter be referred to as establishing a clear ground of judgment applicable to such cases. It had been established by the older case of *Fisher* v. *Dixon*,[4] that in a question between the heirs and executors of a proprietor, moveables annexed to the soil,

[1] Abridged from Lord Cairns' speech in *Brand's Trs.* v. *Brand*, 3 R. (H.L.) at p. 20. See, amongst the older cases, *Hislop* v. *Hislop*, 18 Jan. 1811, F.C.; *Niven* v. *Pitcairn*, 1823, 2 Sh. 270, N.E. 239.

[2] *Tod's Trs.* v. *Finlay*, 1872, 10 M. 422, see p. 426.

[3] *Cochrane* v. *Stevenson*, 1891, 18 R. 1208, where also the views of the writer on this subject are more fully developed. *Nisbet* v. *Mitchell-Innes*, 1880, 7 R. 575; *M'Knight* v. *Irving*, 1805, Hume, 412.

[4] *Fisher* v. *Dixon*, 1845, 6 Bell's App. 286.

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such as the pumping engines and railways of a coal mine, became heritable by annexation. In *Brand's* case this principle was shown to be applicable to the determination of the rights of the heirs and executors of a mineral tenant by whom the machinery and fixtures had been annexed to the estate, and it was pointed out that so long as the estate of the tenant under the lease continued, there was no more reason for regarding his interest in the fixtures as separate from his interest in the soil than if he were owner in fee-simple. Nor does it make any difference that, as against the landlord, who is the owner in fee-simple subject to the lease, the lessee, who has during the term placed upon the subject fixtures severable without damage to the landlord, has the same right of severing and removing those fixtures which an owner in fee-simple during his lifetime would have had.[1]

What amounts to physical annexation.

376. For the purposes of a work on the law of succession, it is only necessary to consider the decisions on this subject which bear on the question of what constitutes physical annexation, observing that, if the moveable be affixed to the heritable subject so that it cannot be severed without injury to the subject, it is to be considered as annexed without reference to intention; but that if the moveable can be severed without injury to the heritable subject, we are at liberty to consider whether it was affixed or annexed *animo et facto*, or was only attached for the purpose of retaining the moveable in the place assigned to it as part of the moveable equipment of the house or building in which it was used. Lord Moncreiff has distinguished the cases where the heir may claim the imperfectly annexed subject, as thus: "Where a certain amount of fixture coincides with any of the following elements—(1) Where the article is essential or material to the enjoyment of the fruits or the use of the heritable subject; (2) If there be a special adaptation in the construction of the article to the uses or improvement of the heritable property to which it is attached which it would not possess if placed elsewhere; or (3) express declaration by the owner of an intention that the article should be annexed to the real estate.[2]

Things which are moveable or immoveable *sua natura*.

377. The cases of the fruits and produce of lands, and buildings and artificial constructions upon lands, do not in general present any difficulty, except in questions between landlord and tenant, which belong to Lord Cairns' second general rule, and the exception to it. In consequence of the decision in *Brand's* case, such cases have been omitted as being more likely to mislead than to assist in the

[1] Per Lord Selborne, 3 R. (H.L.) 28. See opinion of Lord Pr. Inglis in *Watt* v. *Reid*, 1890, 17 R. 519.

[2] *Douall* v. *Miln*, 1874, 1 R. 1180, 1182. See the English case, *D'Eyncourt* v. *Gregory*, L.R. 3 Equity 382.

solution of questions between heirs and executors. In relation to the products of heritable property, the general rule is, that trees and natural fruits, before separation from the soil, are regarded as pertinents of the estate, and are therefore heritable. But in relation to the produce of agriculture the rule is different. Industrial fruits, which are the joint product of the natural powers of the soil and of the skill and capital of the agriculturist, are regarded as manufactures, and are moveable as to succession.[1] Growing crops therefore belong to the executor of the tenant, and not to the heir.[2] Trees, although the product of industrial cultivation, are deemed *partes soli*, and descend to the heir, because, from the lengthened period requisite for the growth of plantations, they are regarded as meliorations made for the benefit of the estate.[3] Trees of course become moveable when cut down and severed from the heritable estate; and where a proprietor, entitled to cut timber, had sold a growing plantation, but died before the whole was cut down, it was held that the price of the part cut down belonged to his executors.[4] And it would seem that shrubs and other perennial plants growing in a nursery ground for sale are to be regarded as moveable in a question between heir and executor, in respect of their being a subject of commerce.[5] Subjects which are *partes soli*, as stones and minerals, become moveable by severance.[6] With regard to subjects not attached to the soil, they fall universally to the executor, irrespective of the consideration whether they are held by the title of possession, or, as in the case of ships, by a written title. Building materials collected for the purpose of being incorporated with an heritable subject would appear not to become heritable until the materials have become physically annexed.[7] A subject which is moveable *sua natura* may become heritable *destinatione*, a principle which is illustrated by the case of *Malloch* v. *M'Lean*,[8] where money set apart to complete a house according to plans approved by the deceased owner was held to be heritable in a question as to legitim.[9] Where the establishment and stock in

Effect of accession. Greenhouses, machinery, furniture.

[1] Stair, 2, 1, 2; Ersk. 2, 2, 4; 2 Bell's Com. 7th ed. p. 2, and cases there cited in note (4).

[2] *Ibid.*

[3] Ersk. *ut supra.*

[4] *Stewart* v. *Stewart's Exrs.*, 1761, M. 5436.

[5] See *Begbie* v. *Boyd*, 15 Dec. 1837, 16 Sh. 232; *Gordon* v. *Gordon*, 1806, Hume, 188. Dunghills, in questions between landlord and tenant, are moveable, and the suggestion of Professor Bell, that they should be regarded as heritable in relation to succession, does not appear to be well founded. See 2 Bell's Com. p. 3; *Lees* v. *Wilson*, Hume, 191; *Watt* v. *Reid*, 17 R. 519.

[6] *Lady Mary Bruce* v. *Erskine*, 1707, M. 14,092; *Stewart* v. *Stewart*, 1761, M. 5436; *Paul* v. *Cuthbertson*, 3 July 1840, 2 D. 1286; *Anderson* v. *Ford*, 16 July 1844, 6 D. 1315.

[7] *Stewart* v. *Watson's Hospital*, 7 Jan. 1862, 24 D. 256.

[8] *Malloch* v. *M'Lean*, 29 Jan. 1867, 5 M. 335.

[9] In *Hislop* v. *Hislop*, 18 Jan. 1811, F.C., a large telescope, solidly fixed in a

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trade of a going business is sold as a going concern, and the price of the moveable stock is thus enhanced by its association with the sale of the heritable subjects, the executors are not entitled in the division of the price to an allowance in name of goodwill.[1]

Moveable subjects rendered heritable by destination.

378. By express destination a moveable subject may be rendered heritable in a question of succession. Thus, jewels, arms, and pictures,[2] or even books and furniture,[3] may be included in an entail, or made the subject of an heritable destination. And although such subjects are not protected from the diligence of creditors by force of the statute concerning tailzies,[4] it may reasonably be maintained that such destinations would be binding *inter hæredes* where the subject was of the nature of an heirloom, or where, from its situation and use, it admitted of being made an accessory to the heritable estate. By tacit and implied destination, materials deposited for the purposes of a structure in the course of erection, or pertaining to a building accidentally thrown down, are heritable in relation to succession;[5] but this principle is not extended to the determination of questions of contract,[6] nor, as it should seem, to questions in relation to the use of diligence.[7]

Heirship moveables.

379. Heirship moveables are heritable by an implied destination, resulting from the rule of law that the heir is entitled to the best of certain kinds of moveable goods belonging to his predecessor.[8] It would appear that articles falling within the proper designation of heirlooms—*e.g.*, a silver cup presented to a deceased proprietor—may pass as heirship moveables when such are specially destined to the heir.[9] But where such subjects were disponed to a person other than the heir, they were held not to have retained their heritable chrracter in a question as to the succession of the

building erected to contain it, was held to be subject to poinding, apparently on the principle that, although physically attached to the building, it was not by its nature or uses identified with the local situation in which it happened to be placed. But in the case of *Arkwright* v. *Billinge*, 3 Dec. 1819, F.C., the security of an heritable bond was held to cover not only the building and steam-engine, but also the machinery used for the purposes of the trade. This decision was not considered satisfactory at the time; and its authority has been impeached by Professor Bell (1 Com. 7th ed. p. 789). See observations in *Niven* v. *Pitcairn*, 2 Sh. 270, N.E. 239.

[1] Lord Kinnear's opinion in *Bell's Tr.* v. *Bell*, 1884, 12 R. 85.

[2] *Baillie* v. *Grant*, 21 May 1859, 21 D. 838.

[3] *Veitch* v. *Young*, 1808, M. "Service and Confirmation," App. No. 4.

[4] Cases of *Veitch* and *Baillie*, *supra*. But see *contra* the case of *Kinnear*, cited Chapter XXVI., Section I.

[5] Ersk. 2, 2, 14; 2 Bell's Com. 7th ed. p. 2.

[6] *Stewart* v. *Watson's Hospital*, 24 D. 256.

[7] *Forbes* v. *Drummond*, 1772, 5 Br. Sup. 583.

[8] See the list of heirship moveables in Hope's Minor Practicks, ed. 1734, 538; *Darg* v. *Darg*, 23 Dec. 1808, F.C.; and cases in Mor. Dic. *voce* "Heirship Moveables."

[9] *Leith* v. *Leith*, *supra*.

disponee;[1] and in the same case a cabinet of coins and books relating thereto were held not to be heirship, as not having any special interest in relation to the person from whom they descended.

SECTION II.

Incorporeal Rights.

Incorporeal rights are heritable when secured on land.

380. Incorporeal rights, like things corporeal, are heritable or moveable in respect of their nature, or of their connection with some other subject of which they form an integral part. All real rights to land, whether proprietary or in security, whether absolute or limited to a term of years or for life, are at common law treated as *immobilia* in relation to title and diligence, and are heritable as regards the succession of the proprietor or creditor. By the Titles to Land Act, 1868, heritable securities were to certain effects made moveable as to succession. Section 117 begins:—"From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor: Provided always, that where any heritable security is or shall be conceived expressly in favour of such creditor, and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor, and shall after the death of such creditor belong to his heirs in the same manner and to the same extent and effect as is the case under the existing law and practice in regard to heritable securities." Then follow provisions applicable to the constitution, transmission, and extinction of heritable securities which it is desired to put under a destination to heirs excluding executors; and the section concludes by excepting from the operation of the general enactment the claims of the public revenue and the rights of husband, wife, and children, which have already been considered, in these terms:—"And further, provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor,

Titles to Land Act, 1868.

[1] *Leith* v. *Leith*, 19 June 1863; 1 Macph. 949.

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and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti*, where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ*, where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise: Declaring, nevertheless, that this provision shall in no way prejudice the rights and interests of wife or husband, or of the creditors of either, in or to the by-gone interest and annual rents due under any such heritable security, and *in bonis* of the husband or wife respectively prior to his or her death; and further provided, that where legitim is claimed on the death of the creditor no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim." There is an exception, depending on the interpretation clause, of "securities by way of ground-annual, whether redeemable or irredeemable," and "absolute dispositions qualified by back bonds or letters." The case of *Stroyan* v. *Murray*,[1] in which it was held that the creditor's right in an assignation of a leasehold estate, qualified by a back-letter, fell to executors (if well decided), seems to mark a flaw in the Statute, the principle of which is to treat "floating" securities as heritable property.

Question as to real burdens under the Conveyancing Act, 1874.

381. By the 30th section of the Conveyancing Act, 1874, the general object of which is to assimilate the tenure of the creditor in a real burden to that of an heritable creditor, it is incidentally provided that "the forms referred to, as well as the provisions and enactments contained in section 117 of the said Act, shall be taken to apply, as nearly as may be, to real burdens upon land." If this was intended to make real burdens moveable as to succession, and it is not doubted that such is its general effect, the proviso deserved a more careful consideration than it has received from those members of the Legislature who are responsible for its inclusion in this section. The exception of "securities by way of ground-annual, whether redeemable or irredeemable," is repeated; but it seems to have been forgotten that in feu-charters, as well as dispositions subject to a ground-annual, it is customary to constitute certain conditions and obligations, prescribed for the benefit of the community of feuars or disponees, real burdens on the estate. It may be that this is not good conveyancing, and that the efficacy of such clauses really depends on the fact or inference that they are conditions of the grant. But the point ought not to have been treated as it is by making all real burdens descendible to personal representatives, because it is plain enough that in the cases referred

[1] *Stroyan* v. *Murray*, 1890, 17 R. 1170; Lord Rutherfurd Clerk dissented.

to the heir may have an interest, and the personal representatives can have no interest in the enforcement of the burden.

Transmission of real securities.

382. Returning to the 117th section of the Act of 1868, it follows of course that where family provisions were before the passing of the Act secured on land, those members of the family who died before the commencement of the Act transmitted an heritable interest to their heirs, and those who died after the Act transmitted a moveable interest.[1] Again, where a testator disposes of his heritable and moveable estates by separate instruments or clauses, heritable securities fall under the latter category.[2] It is true that the effect of the Statute is to create a species of property *sui generis*, which is moveable to certain effects only; but its words are sufficiently comprehensive to support the decisions cited, because the Act of Parliament prescribes two things:—(1) that such securities shall be moveable as regards the succession of the creditor; and (2) that they shall belong after his death to his executors, *i.e.*, in case of intestacy. As regards title, the section contains internal evidence that no alteration was intended to be made with reference to the transmission of the real security. Accordingly such securities are transferable *inter vivos* by disposition, and after death (if subject to a destination) by the service of the heir-substitute *quâ* heir of provision.[3]

Rights of husband, wife, and children.

383. As the Act of Parliament declares that heritable securities "shall continue and shall be heritable" as regards courtesy and terce,[4] &c., it follows by plain induction that if one of the personal representatives in whom a share of the heritable debt has vested dies, the interest of the borrowed money will be subject to terce, and the capital will not be subject to *jus relictæ* or legitim. But here a distinction is taken. If the bond be vested in trustees for a beneficiary (A) who dies, that beneficiary's executor (B) is not a creditor in the bond, but a beneficiary whose interest in the trust is a *jus crediti* of the ordinary description, and wholly moveable. Hence, on the death of B, his share of the secured debts would seem to be subject to *jus relictæ* and legitim, and it has been so decided.[5]

Other securities; trusts for creditors.

384. Titles of honour and heritable offices also descend to the heir. The character of a right as heritable or moveable does not depend on the nature of the title or possession had by the ancestor. Accordingly, heritable rights to land, although not made real, *e.g.*, heritable bonds on which infeftment had not been taken, were at

[1] *Cunningham* v. *Cunningham*, 1889, 17 R. 218.

[2] Sp. Ca. *Guthrie*, 1880, 8 R. 34; *Hughes' Trs.* v. *Corsane*, 1890, 18 R. 299.

[3] *Hare* (*ex parte*), 1889, 17 R. 105; Court of seven judges.

[4] *Hodge* v. *Hodge*, 1879, 7 R. 259.

[5] *Gilligan* v. *Gilligan*, 1891, 18 R. 387.

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common law heritable in relation to succession.[1] But if the connection of the right with land is conditional, the right remains moveable in the meantime; and therefore, where an heritable bond contained a warrant for infeftment failing payment at the term, the right, which by the infeftment would have become heritable, was held to remain moveable until the term of payment.[2] Where an heritable security is constituted in favour of a body of creditors, the character of the security as heritable or moveable would appear to depend on considerations similar to those which determine the quality of an interest in a trust-estate of heritable property.[3] Where the lands are conveyed to the creditors by name, either directly or through the intervention of a trustee, for security of the payment of their debts, and the creditors or the trustee are infeft, the debt would seem to be in the same position as a debt secured by bond and disposition in security.[4] But where the lands are conveyed to the trustee for the purpose of sale, and the right of the creditors is merely a right to a share of the proceeds of the sale, their interest in the estate is wholly moveable, and is subject to the claims of the wife or husband and children.[5]

Annuities and rights having *tractus futuri temporis*.

385. Rights having *tractus futuri temporis* are heritable as to succession. These are defined by Erskine as being "rights of such a nature that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they subsist, without relation to any capital sum or stock, *e.g.*, a yearly annuity or pension for a certain term of years."[6] In *Hill* v. *Hill*[7] this definition was approved by the Court, and the right under a will to the interest of a fund for a definite period was held to be moveable in a question between the heir and the executor of the annuitant instituted, because it had relation to a specific capital stock of which it was the income. To this class of rights belong annuities, and, according to Stair, tacks and reversions. A debt is not considered as having a tract of future time merely because the term of payment is postponed, although interest in the meanwhile is periodically payable, nor because it is payable by instalments. In such cases the character of the succession is determined by the nature of the subject.[8]

[1] Ersk. 2, 2, 5; 2 Bell's Com. 7th ed. p. 4; 2 Bell's Com. 5th ed. p. 4; *Menzies* v. *Menzies*, 1738, M. 5519.

[2] *Fisher* v. *Pringle*, 1718, M. 5516.

[3] This subject is treated in Chapter XI. (Constructive Conversion).

[4] *Cave's Crs.* v. *Murray*, 1736, Elch. "Heritable and Moveable," No. 4; as corrected in *Smith* v. *Smith*, 1737, Elch. *ut supra*, No. 6; 2 Bell's Com. p. 5.

[5] *Hawkins* v. *Hawkins*, 23 May 1843, 5 D. 1035; *M'Ewen* v. *Thomson*, 1793, M. 5596.

[6] Ersk. 2, 2, 6; Stair, 2, 1, 4; 2 Bell's Com. p. 4; see *Earl of Dalhousie* v. *Gilmour*, 1789, M. 15,915.

[7] *Hill* v. *Hill*, 1872, 11 M. 247; see observations on the definition of Bell, 2 Com. 4.

[8] *Fraser* v. *Bowie*, Hume, 210; *Hogg* v. *Grieve*, 1807, Hume, 189; case of *Campbell* there cited.

Debts how affected by collateral heritable security.

386. Debts originating in an obligation to pay money, or which on other grounds are in their own nature personal or moveable, may become heritable by a collateral security being given for them, though not completed into a real right.[1] Thus personal bonds containing an assignation to an heritable subject in further security are heritable.[2] And a family provision, when declared to be a real burden on the granter's heritable estate, will transmit to the heir and not to the executor of the legatee, if the latter have survived the period of vesting.[3] The assignation of a lease in security of a debt previously constituted does not work a conversion from moveable to heritable in a question of succession,[4] though it has been held that a debt so secured would not be attachable by arrestment.[5] Again, a testamentary provision, moveable in its constitution, does not become heritable in consequence of the truster having in his settlement granted heritable security in respect of it.[6] And although an accessory heritable security converts a moveable into an heritable debt, yet an accessory moveable security does not change the nature of an heritable debt. So a personal bond of corroboration does not alter the nature of a debt heritably secured.[7]

Moveable bonds: quality as to succession under the Statute.

387. The quality of personal bonds bearing interest, in relation to the creditor's succession, is regulated by Statute. By our ancient law, personal bonds bearing a clause of annual-rent were held to be *quasi feuda*, as having by their yearly produce something of the character of permanent rights. But, inasmuch as the obligation of annual-rent was held to be conditional on the not payment of the bond at the appointed time, such bonds were considered moveable for the period anterior to the term of payment,[8] and *that* even where interest was stipulated from the date of the bond, but was not made payable until the arrival of a future term.[9] It would appear that such bonds were regarded as heritable from the commencement, where interest was by express stipulation made payable before the term of payment of the principal.[10] By Statute

[1] 2 Bell's Com. 7th ed. p. 5; Stair, 2, 1, 3; Ersk. 2, 2, 12.

[2] *Fraser's Trs.* v. *Fraser*, 1749, M. 5491; and see the case of *Massie's Trs.* v. *Massie*, 1816, Hume, 193, as to the effect of an infeftment in the debtor's entailed estate, but to the effect only of assigning the lands for payment of the debt.

[3] *Napier* v. *Orr*, 18 Nov. 1864, 3 Macph. 57.

[4] *Duncan* v. *Rae*, 15 Feb. 1810, F.C.

[5] *Watson* v. *M'Donald*, 1794, M. 731; and see, as to the question of diligence, *Smith's Trs.* v. *Grant*, 27 June 1862, 24 D. 1142.

[6] *Meiklam's Trs.* v. *Mrs. Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159.

[7] Ersk. 2, 2, 16; *Duke of Hamilton* v. *Earl of Selkirk*, 1740, M. 5554, 1 Cr. St. & P. 271; *Craw* v. *Earl of Kellie*, and other cases cited in M. pp. 5550-5552.

[8] See Ersk. 2, 2, 9 and 10; *Smith* v. *Anderson*, and other cases in M. pp. 5503-5506.

[9] *Porteous* v. *Veitch*, 1627, M 5463; *Hughson* v. *Hughson*, 22 Nov. 1822, F.C.

[10] See Common Agent in *Ranking of Parton* v. *Ramsay*, 23 June 1825, F.C.

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1641, cap. 57, revived by 1661, cap. 32, in order to enlarge the provisions for younger children, such bonds are declared to descend to children and next of kin; but in other respects their character is regulated by the common law; and they are therefore heritable, after the term of payment, in relation to the rights of husband and wife, and questions of forfeiture.[1] By Statute 1661, cap. 51, debts due on personal bonds may be attached either by arrestment or adjudication during the lifetime of the debtor; but after his death heritable diligence is alone competent. A cautionary obligation, which in its nature is moveable, is held to be rendered heritable, *quoad* the *jus relictæ* of the creditor's widow, by the intervention of a bond of corroboration bearing a clause of interest.[2]

Bonds secluding executors.

388. The principle that subjects moveable in their nature may be rendered heritable by destination, is exemplified in the case of bonds taken to the creditor and his heirs, "secluding executors." Such bonds not only descend to the immediate heir of the creditor in virtue of the express destination in his favour, but, upon the death of the heir, they transmit as heritage to the person representing him, whether as heir-at-law or as general disponee.[3]

Moveable incorporeal rights. Actions: Proceeds of sale. Copyrights.

389. We have already noticed the chief peculiarities in the classification of incorporeal rights as heritable or moveable. These for the most part depend on the effect due to the nature of the security, and to its duration. Subject to the exceptions which have been already pointed out, it may be asserted, generally, that all incorporeal rights not secured over landed estate, or connected with it, are moveable, and descend to executors. Rights of action of every description, excepting real actions, are moveable rights in this sense.[4] Beneficiary interests in landed estate are heritable or

[1] See Ersk. *ut supra;* and the case of *Downie* v. *Downie's Trs.*, 14 July 1866, 4 Macph. 1067, where a mortgage granted by Parliamentary Commissioners in favour of *A. B.*, his executors, administrators, and assigns, was held equivalent to a moveable bond. Exception was taken by Lord President M'Neill to the statement of the doctrine in relation to moveable bonds in the institutional writers; and the law was laid down to be, that such bonds are moveable by force of the Statute, and that the rights of widows and the fisk are excepted from the operation of the Statute.

[2] *Ross* v. *Graham*, 14 Nov. 1816, F.C. The distinction which prevails in relation to such bonds in reference to rights accruing before and after the term of payment, is well illustrated by the case of *Gray* v. *Walker*, 11 March 1859, 21 D. 709. Observe, that the heritable character of personal bonds, *quoad* the widow's rights, is not extinguished by an action for payment at the instance of the creditor; *Munro* v. *Munro*, 1735, Elchies, "Heritable and Moveable," No. 2.

[3] Ersk. 2, 2, 12; Statute 1661, cap. 32; *Kennedy* v. *Kennedy*, 1747, M. 5499; and see *Ross* v. *Ross*, 4 July 1809, F.C., for a fuller exposition of this subject. A bond destined to the heir, without mention of executors, loses its heritable character as soon as the destination has taken effect; *Kennedy* v. *Kennedy*, *supra*. This description of security is regulated by the 117th section of the Titles Act, 1868.

[4] See *M'Michael* v. *Queensberry's Exrs.*, 14 Jan. 1829, 7 Sh. 243, as to a claim of damages by a tenant against his landlord.

moveable according as the estate of the beneficiary consists in the right to a specific conveyance of the subject or to a share of the proceeds of it when sold.[1] An exception to this principle—no longer of practical consequence—was admitted under the name of surrogate, viz., that the sale or realisation of a wife's heritable estate had not the effect of extending the *jus mariti* to the proceeds of the sale, unless on proof of the wife's intention to make a gift of the estate or its proceeds to the husband.[2] It was long considered a doubtful question whether copyrights and patent rights were not heritable, in respect of their duration. As regards patent rights—including in that category license duties and sums recovered from infringers, as well as the value of the patent right itself—the point is now settled by the case of the *Advocate-General* v. *Oswald*,[3] where it was held that the right of a patent invention was personal property; that legacy duty attached to it; and that such duty was chargeable upon the whole profits of the invention in whatever manner accruing. This decision rules the analogous questions in relation to the copyright of books, pictures, and engravings.

Interests in estates of societies or partnerships.

390. The distinction in the law of succession betwixt corporeal and incorporeal rights is nowhere more conspicuous than in the instance of real property forming part of a partnership estate. The right of a partner in the estate of a mercantile company is purely incorporeal; and the interest which a deceased partner transmits to his representatives is of the same nature. That right is one and indivisible; and, having regard to the nature of the property which usually forms the bulk of the assets of trading societies, it is held to be personal. As a consequence of the rule that the partner's interest in the estate is personal, it follows that heritable estate, vested in trustees for the benefit of a mercantile company, is by its destination excepted from the rules of heritable succession. The legal estate remains vested in the trustees of the firm; and the right of the deceased partner, which is merely a right to demand a share of its value as part of the assets of the company, is a personal right descending to his executors.[4] Again, where property

[1] The application of this simple principle to the construction of clauses in trust-dispositions and settlements constitutes a separate and very important doctrine in the law of construction, which, for convenience, is treated in a separate chapter. See Chapter XI. (Constructive Conversion.)

[2] *Nisbet* v. *Rennie*, 1818, Hume, 221; *Heron* v. *Espie*, 18 D., at 917; *Spence* v. *Paterson's Trs.*, 1873, 1 R. 46. As to the effect of calling up a heritable security which is subject to terce, see Stair, 2, 6, 17; Ersk. 2, 9, 48.

[3] *Advocate-General* v. *Oswald*, 20 May 1848, 10 D. 969, and Exchequer cases.

[4] *Rae* v. *Nelson*, 1742, M. 716; *Young* v. *Campbell*, 1790, M. 5495; and cases of *Corse* v. *Corse*, *Sime* v. *Balfour*, and *Murray* v. *Murray*, in M. "Heritable and Moveable," App. Nos. 2, 3, and 4; also *Sime* v. *Kirkpatrick*, 22 July 1811, 5 Pat. 525.

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vested in the person of a partner of a mercantile company is proved to be truly an estate in trust for the company, the beneficiary interest is assets of the company; and the share or interest of a deceased partner therein belongs to his executors.[1] The succession is not held to be altered by a declaration in the contract of copartnery that on the death of a partner his share shall belong to his heir; for in such cases the word heir is construed *secundum subjectam materiam*, and means executors, or heirs *in mobilibus*.[2]

Shares, stock, and public funds.

391. Shares or stock of public companies are in the same position, with regard to succession, as interests in private partnerships.[3] And even where by the charter of erection of a bank or other public company the stock is declared not to be subject to arrestment or other personal diligence, the nature of the estate in relation to succession is held to remain unchanged.[4] Government stock, although generally classed with the stock of private companies as an investment, is obviously of a different nature in its legal relations. Strictly speaking, a fundholder is simply an annuitant; for, by the terms of the Government loans, he has no right to demand payment of the principal, and can only convert his right into money by a sale in the stock market. The Statutes constituting the public debt declare that the annuitants shall be possessed thereof as of personal estate.[5] Bank of England stock is personal, in respect of the law of the country in which the concern is locally situated.[6]

SECTION III.

Conversion under an uncompleted Contract of Sale.

Contracts interrupted by death of party: Agency and trusts.

392. We proceed to the consideration of the rights of heirs and executors under contracts in relation to heritable property involving a conversion of the estate from heritable to moveable, in which the completion of the contract has been interrupted by the death of one of the contracting parties.[7] It is necessary to premise,

[1] *Minto* v. *Kirkpatrick*, 23 May 1823, 11 Sh. 632.

[2] *Irvine* v. *Irvine*, 15 July 1851, 13 D. 1367.

[3] 2 Bell's Com. 7th ed. pp. 3, 4

[4] 1 Bell's Com. 7th ed. p. 101; *Dalrymple* v. *Halkett*, 1735, M. 5478.

[5] 25 Geo. III., cap. 32, § 7, and subsequent Acts; and see *Hog* v. *Hog*, 1791, M. 5479.

[6] In the case of *Downie* v. *Downie's Trs.*, 14 July 1866, 4 Macph. 1067, the general principle was recognised that, in relation to the rights of successors, foreign securities, forming part of the estate of a domiciled Scotsman, are to be regarded as heritable or moveable, according to the *lex loci rei sitæ*. See also *Murray* v. *Earl of Rothes*, 30 June 1836, 14 Sh. 1049; *Newlands* v. *Chalmers' Trs.*, 22 Nov. 1832, 11 Sh. 65.

[7] With reference to the mode of trying questions of this kind, it would appear that the holder of a fund, the quality of which is exposed to doubt, is not entitled to make it the subject of an action of

that in the case of conversion under a contract entered into by a commissioner or trustee duly authorised, the consequences are the same in relation to succession as if the contract had been by the deceased in his own name. Thus, where an agent duly authorised invests the money of his client in heritable securities, the creditor's right in the bonds is heritable, and transmits to his heir-at-law.[1] But the investment of funds by a trustee, tutor, or factor on heritable security has not the effect of converting moveable estate into heritable in a question as to the succession of the ward or beneficiary, because the quality of the beneficiary's estate in the trust cannot be changed by the administrative acts of the trustee. The estate in the person of the trustee is, of course, heritable, although heritable security was only chosen as a safe investment; but the *jus crediti* under the trust remains moveable.[2] Heritable property purchased by an agent on behalf of a client resident abroad, without special instructions, was held to be moveable as to succession.[3] And on this principle the right to payment of a personal debt was held to belong to the executor of the creditor, although the debtor, for the security of his creditor, had taken a disposition of property which he had purchased in the creditor's name, because it was not proved that the deceased considered the disposition a security for the debt.[4]

Heir is bound to grant conveyance in implement. Executor is entitled to the price.

393. The most simple case of constructive conversion under uncompleted contracts is that of a sale of heritable estate, where one or both of the parties to the contract dies before the disposition is executed. In such a case the heir is bound to complete the sale by executing a disposition in favour of the purchaser or his heir, but the price is moveable; it is payable in case of death by the purchaser's executor, and belongs in case of death to the seller's executor. The rule is illustrated in the three following cases:— In *Heron* v. *Espie*[5] the question was as to the price of heritable subjects taken by a railway company under their compulsory powers. The price was ascertained by arbitration, and a disposition was prepared and revised by the agent of the proprietor; but while the disposition was unsigned the proprietor died. It was

multiplepoinding unless competing claims have been intimated to him; *Great North of Scotland Ry. Co.* v. *Gauld*, 8 July 1863, 1 Macph. 1053.

[1] *Davidson* v. *Kyde*, 1797, M. 5597; 16 May 1798, 4 Pat. 63; *Trotter* v. *Trotter*, 5 Dec. 1826, 5 Sh. 72; 10 June 1829, 3 W. & S. 407.

[2] *Ross* v. *Ross*, 1793, M. 5545; *Graham* v. *Earl of Hopetoun*, 1798, M. 5539; *Moncrieff* v. *Miln*, 16 July 1856, 18 D. 1286.

[3] *M'Millan* v. *M'Millan's Exrs.*, 23 Nov. 1814, 3 Sh. 308, N.E. 217.

[4] *Marshall* v. *Lyall*, 18 Feb. 1859, 21 D. 514.

[5] *Heron* v. *Espie*, 3 June 1856, 18 D. 917; *Chiesly* v. *Chiesly*, 1704, M. 5531; *M'Intosh* v. *Primrose*, 1685, M. 5087; *Currie* v. *Shortreid*, 1818, Hume, 200.

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held, disregarding all supposed indications of intention, that the price belonged to the seller's personal representatives. In the case of *Rossborough's Trustees* the question was as to the rights of the creditor's widow in relation to heritable bonds called up but not paid. In one case the creditor had served the usual intimation and requisition for payment, but no further steps were taken. In another, after the expiry of the period for payment under the requisition, the subjects were advertised for sale, but had not been sold or exposed for sale. In a third, the subjects had been brought to sale, but had not found a purchaser. In the fourth case, the subjects had been exposed for sale and were actually sold, but the purchaser being unable to pay the price, the contract of sale remained unfulfilled, and the purchaser obtained no title to the subjects. It was held that the widow was entitled to terce, and that, "though the husband has actually sold his heritable estate, and the purchaser be ready to fulfil his contract and to pay the price, yet, if the purchaser be not infeft during the husband's lifetime, the right of terce will not be excluded.[1] Lastly, in the case of *Ramsay* v. *Ramsay*, a purchaser of heritable property became bound in July to pay the price of the subjects in September, but died in August, while the contract was unfulfilled. The estate was re-sold at a large profit after the death of the first purchaser. It was held (without calling for a reply on the legal question) that the heir was entitled to the price obtained on the second sale, but that the executor was liable to pay the price (without deduction of debt heritably secured) in fulfilment of the ancestor's obligation under the first contract of sale.[2]

Sale by an apparent heir.

394. The case of *Emslie* v. *Groat* established an exception for the case of lands sold by an apparent heir who dies without making up a title and conveying the property. In this case the price was found to be a surrogatum for the lands, and to belong to the heir next in succession, who had made up a title by passing over the apparent heir.[3] That exception of course disappears under the existing law, by which heritable estate vests in the heir without service. Where a truster destined the whole free proceeds of his unentailed lands to one person, and his moveable estate to another, the price of lands sold under an uncompleted contract in his

[1] *Rossborough's Trs.* v. *Rossborough*, 1888, 16 R. 157, 161.

[2] *Ramsay* v. *Ramsay*, 1887, 15 R. 25; see *Macnicol* v. *Macnicol*, June 16, 1814, F.C.; *Ross* v. *Clayton*, 1826, 2 W. & S. 40, affg. 3 S. 271. The subject of the liability of executors for the price of lands sold but not conveyed is considered in Chapter LXXII. (Order of Liability of the Real and Personal Estates).

[3] *Emslie* v. *Groat*, 25 Feb. 1817, Hume, 197: "The Court were of opinion that the price of lands which have been sold is a moveable fund, but only when they have been sold by the owner, which an apparent heir is not; that, in the latter case, the price comes in place of the lands, and that the Act 1695 does not affect the interest of after heirs."

lifetime was held to pass under the first-mentioned destination.[1] A mere contract to give security is not sufficient to impress an heritable character as to succession upon a personal debt. Where an heritable bond is granted, or where the creditor has adjudged in security, the debt becomes heritable, though infeftment may not have followed it; but should the creditor die before the bond is delivered, or before the decree of adjudication is pronounced, the debt retains its moveable quality.[2]

Proceeds of sale of heritable estate by creditor under a power.

395. The rights of heirs and executors in relation to money due under heritable securities (of which an example has just been given) are governed by the same principles which regulate the succession to the price of land. But in this case a distinction is recognised between the security and the personal contract. The resolution of the creditor to recover payment of an heritable debt is not equivalent to conversion;[3] but there is a series of decisions to the effect that the use of personal diligence, by giving a charge on the registered bond, renders the fund moveable.[4] A charge, followed by adjudication, has the effect of reconverting the fund into heritable estate in respect of the new security acquired by real diligence.[5] In any case, if the estate be actually converted at the instance of the creditor, as by a sale under a power in the bond, the right to the price becomes moveable, notwithstanding that the subject was not transferred to the purchaser in the creditor's lifetime.[6] And where an heritable estate, burdened with debts, is sold by the proprietor, with the consent of the heritable creditors, the debts of creditors who have consented to the sale are mobilised by the completion of the contract of sale, so that if a creditor dies while the price is unpaid and the conveyance unexecuted,[7] his personal representatives are entitled to the money.

Distinction where sale effected by the debtor.

396. The decisions in relation to sales at the instance of the debtor point to the conclusion that the quality of the creditor's

[1] *Breadalbane's Trs.* v. *Pringle*, 19 Jan. 1854, 16 D. 359.

[2] Ersk. 2, 2, 14; 2 Bell's Com. 7th ed. p. 5; *Carnegie* v. *Carnegie*, 1700, M. 5537, and see *Wedderburn's Crs.* v. *M'Kenzie*, 1742, Elchies, "Arrestment," No. 21.

[3] *Monro* v. *Monro*, 1735, M. 11,357; *Roxborough's Trs., supra.* The registration of a bond for execution does not operate a conversion into moveable estate; *Yeaman* v. *Yeaman*, 1687, M. 5484, 5581.

[4] *Donaldson* v. *Donaldson*, 1624, M. 5571; *Montgomery* v. *Stewart*, 1666, M. 5584; *Seaton* v. *Seaton*, 1672, M. 5572; and see *Douglas* v. *Dickson*, 1751, M. 5577 (Kilkerran's Report), for the opinions expressed on this point in a special case. A distinction is taken in the case of bonds secluding executors, which are held to remain heritable *destinatione* notwithstanding the use of personal diligence; *Bannatyne* v. *Bonnar*, 1683, M. 5581; *Gray* v. *Panton*, 1705, M. 5581.

[5] *Reid* v. *Campbell*, 1728, M. 5538; *Douglas* v. *Dickson*, 1751, M. 5577.

[6] *Wilson* v. *Wilson*, 29 Nov. 1808, F.C.

[7] See *Smith* v. *Smith*, 1737, M. 5534, Elchies, "Heritable and Moveable," No. 6. In this case the purchaser was infeft, though the price remained unpaid.

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estate is not affected by any proceeding on the part of the debtor short of actual payment. The transference of the debtor's reversionary interest in the estate by a voluntary sale leaves the security title unimpaired; and until the creditor shall have accepted payment and discharged the debt, he cannot be held to have abandoned his real right, or changed the quality of his succession. Even in the case of a judicial sale, the debts secured on the estate continue to be heritable until payment of the price; and, conversely, the production of a claim of personal debt in a ranking and sale has not the effect of making the debt heritable.[1] It has been held that the seller's reversionary interest in estates sold for the payment of debts is heritable in relation to diligence [2] and succession;[3] on the last point the subject may require reconsideration, in consequence of the decision in the case as to compulsory sale (*Heron* v. *Espie*). Where a purchaser at a judicial sale has consigned the price in bank, in terms of the Statute, it would seem, on the authority of the above-mentioned case of *Garland*, that, as regards the interests of the heritable creditors and their successors, their securities are to be held as converted into personal estate for all purposes.[4]

Quality of succession not changed by collation.

397. In the case of *Napier* v. *Orr* it was held by the whole Court that the collation by one who was heir and next of kin of his heritable interest in a succession which vested in his lifetime, but was not payable until after his death, had not the effect of changing the quality of the succession from heritable to moveable in a question between the heirs and executors of the other next of kin. The effect would be obviously different if the collation were made in the form of a money payment,[5] instead of an actual transfer of the lands to the next of kin.

SECTION IV.

Apportionment of Rents and Termly Payments.

Arrears of rent and interest moveable at common law.

398. While the right of the proprietor of heritable estate necessarily comprehends the *jus crediti* or prospective interest in the rents and profits of the estate, the accruing payments or profits, after they have actually vested in the proprietor, are regarded as having lost their connection with the land, and are therefore

[1] 19 and 20 Vict., cap. 79, § 102, re-enacting the provisions of the Statute of Geo. III. *Henderson* v. *Stewart*, 1796, M. 5534.

[2] *Gardiner* v. *Spalding*, 1779, M. 730.

[3] *Garland* v. *Stewart*, 12 Nov. 1841, 4 D. 1.

[4] The doctrine here stated has been recognised in relation to actions for the redemption of wadsets. See Ersk. 2, 2, 16; *Stormonth* v. *Robertson*, 24 May 1814, F.C.

[5] *Napier* v. *Orr*, 24 Jan. 1868, 6 M. 264.

moveable. On this principle, arrears of feu-duty, rent, or interest due to a deceased proprietor are part of his executry estate.[1] With respect to fruits and growing crops unreaped, and rents current at the date of the proprietor's death, certain distinctions have been recognised which, though arbitrary in their result, depend on the consideration whether the ancestor had a vested right in the subject.

Current payments: cases distinguished.

399. The law in relation to the distribution of fruits and termly payments involves two distinct cases, which are considered separately. The first case relates to the right of the executor in competition with the heir-at-law or heritable disponee of a fee-simple proprietor, and, prior to the passing of the Apportionment Act, 1870 (1st August 1870), was regulated wholly by the common law, and is now regulated by the Apportionment Act, 1870, in all cases to which the conditions of that Statute can be applied. The second case relates to the right of the representatives of a person having only a limited interest in real or personal property in competition with the person succeeding to the reversion. In this class of cases the profits of the current period of possession (if derived from termly payments) are divisible under the provisions of the Apportionment Acts. If not payable at termly periods, they are regulated by the common law; and it does not appear that the rule of distribution depends in any degree on the quality of the estate, as heritable or moveable.

Subjects in the personal occupation of the proprietor.

400. I. Rights of the Executors of Fee-Simple Proprietors at Common Law.—Where the subject is in the natural occupation of the proprietor—as a mansion-house, pleasure-grounds, or shootings—the usufructuary interest coincides with the actual possession, and vests *de die in diem*. The proprietor has had the full benefit of the subject to the period of his death, and the heir is entitled to continue the possession from that period. No right, therefore, accrues to the executor. An annuity or other usufructuary interest, if conditioned to be paid or enjoyed daily and continually, vests *de die in diem*, and the executors are entitled to claim the profits to the date of the ancestor's death.[2] Erskine lays down that, in a question between liferenter and fiar, the duration of the usufructuary interest in fishings, collieries, salt-works, mills, and such other subjects, the profits whereof arise from continual

[1] *Keirie* v. *Nicolson*, 1671, M. 5448; *Lord Elibank* v. *M'Kenzie*, 1711, M. 5462; *Campbell* v. *Campbell*, 1743, M. 5247; *Martin* v. *Agnew*, 1755, M. 5457.

[2] Ersk. 2, 9, 66; Bell's Pr. § 1498; and case of *Dalhousie* there cited, M. 15,915. The principle is applied to the apportionment of interest and dividends receivable by trustees between beneficiaries entitled respectively to the income and the reversion of the trust-estate; *Wood* v. *Menzies*, 1871, 9 M. 775; *Cameron's Factor* v. *Cameron*, 1873, 1 R. 21.

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daily labour, is not governed by any legal terms, but is determinable at the actual date of the liferenter's decease.[1] This principle of division is equally applicable to the determination of questions between the heirs and executors of a fee-simple proprietor when the income of the estate is not received in the shape of termly payments. In a modern English case, it was held that royalties, payable under mining leases, did not fall within the scope of the Apportionment Act as termly payments, but vested in the proprietor, according to the extent of the workings, up to the time of his death.[2]

Rents and interest accruing from fee-simple estate.

401. Rents and interests of heritable estate which was fee-simple estate in the person of the ancestor were at common law not subject to apportionment, but were payable to the executor only in so far as vested and unpaid at the ancestor's death. Here it is necessary to distinguish between the vesting of the rents of arable farms and the interest of heritable debts, on the one hand, and the rents of grass farms and houses on the other.

Rents of arable farms.

402. Subject to the exception to be immediately noticed in the case of grass farms, the rents of lands vest half-yearly and termly, beginning at the first legal term after the date of entry; and payment is due at the same time as the right vests. The customary period of entry being at the separation of the crop (which cannot be held to be completed until Martinmas), the first half-year's rent accordingly vests, and, in the absence of special stipulations, is payable at Whitsunday, the second at Martinmas next ensuing. These terms of payment, which are called the legal terms, are independent of the entry, which is always special, the entry to houses and pasture being at Whitsunday, sometimes preceding, sometimes following, the entry to the arable land. Hence executors had no right to the rents which became payable at legal terms subsequent to the death of the proprietor,—because they did not vest in the ancestor's lifetime.[3] But the payment of rent was usually postponed until the next ensuing term, and these rents, vested but not payable, belonged to the executor. Rents payable

[1] Ersk. *ut supra*.

[2] *St. Aubyn* v. *St. Aubyn*, 1 Drew. & Sm. 611, 30 L.J. Ch. 917. The writer has difficulty in following the reasoning which induced the Court in *Weir* v. *Durham* (1870, 8 M. 725) to treat royalties or "lordships," payable under a lease of minerals, on the same principles as agricultural rents. Such is the language of the late Lord President, explaining the case in *Bannatine's Tr.* v. *Cunninghame*, 10 M. at p. 324. But whatever may be the value of the decision, there can be little doubt that under the Apportionment Act, 1870, royalties are apportionable; and the decision of the First Division of the Court as to shooting rents, in *Lord Glasgow's Trs.* v. *Clark*, seems directly in point (1889, 16 R. 545, 549), the circumstance that the case was one between seller and purchaser being immaterial in the construction of that Statute.

[3] Bell's Pr. § 1499; 2 Com. p. 8.

in grain or produce of land, if payable at termly periods, are governed by the same rule as money rents.[1]

Interest of heritable debts.

403. Interest accruing under heritable bonds at the legal terms of Whitsunday and Martinmas is as rent due at those terms. The executor at common law was only entitled to arrears payable at terms preceding the ancestor's death. If conventional terms are prescribed by the bond or document of debt, the right of the executor depends on the agreement.[2] Family provisions, as well as debts charged on heritable estate, and feu-duties, followed this rule whenever the payment was due at termly periods, and the interest of the payee did not terminate with his death.[3] Rents payable by anticipation, or forehand rents, are in a different position. The right in this case necessarily vests at the term of payment, and arrears of such rents, if payable in the ancestor's lifetime, belong to his executor.[4]

Effect of payment by anticipation.

Rents of grass farms.

404. In the case of grass farms the rule is different from that applicable to arable farms. The period of entry is at or preceding Whitsunday. The first half-year's rent is held to vest at Whitsunday, being the term of entry next ensuing the date of the actual entry; the second vests at Martinmas. But it is customary to postpone payment of the rent to the terms immediately following these periods respectively. Where, therefore, a proprietor died between Whitsunday and Martinmas, his executors had right to the rent due at Whitsunday and payable at Martinmas; where he survived the term of Martinmas, they had right to the second half of the year's rent which became due at Martinmas and was payable at the following Whitsunday.[5] House rents followed the

Rents of urban subjects.

[1] Ersk. 2, 9, 66; *Baillie* v. *Cuthbert*, 1684, M. 15,900.

[2] *Kinninmond* v. *Rochead*, 1739, M. 5415, Elch. "Heritable and Moveable," No. 10; *Lord Daer* v. *Lord Hamilton*, 1740, Elch. "Heritable and Moveable," No. 11, 5 Br. Sup. 695.

[3] 2 Bell's Com. 7th ed. p. 8.

[4] *M. of Queensberry* v. *Montgomery*, 18 Feb. 1814, F.C., and cases cited. "The meaning of the common maxim that the legal and not the conventional terms are the rule between heir and executor is no other than this, that the postponing the legal term by the convention of parties, which generally is the case of tenant's rents, does not deprive the executor of the benefit of the legal term. But if, by the convention of parties, annual rents, for example, be made payable before the legal term, the executors will have the benefit of that convention, and the case would be the same in a forehand payment of rents of lands, *for there is no instance of what is both due and exigible not going to executors*;" Lord Kilkerran in *Murray Kinnyndmond* v. *Cathcart*, 1739, M. 15, 906.

[5] *Pringle* v. *Pringle*, 1741, M. 5419; *Turnbull* v. *Kerr*, 1760, M. 5430; *Johnston* v. *M. of Annandale*, 1727, M. 15,913; *Elliot* v. *Elliot*, 1792, M. 15,917; *Campbell* v. *Campbell*, 18 July 1849, 11 D. 1427. The statement made in this case, that the rents due at Whitsunday and Martinmas, and payable at Martinmas and the following Whitsunday, were "conventionally" postponed, appears to be inaccurate, the fact being that these are the customary periods of payment. The law is correctly laid down by Lord Fullerton, p. 1454.

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same rule as the rents of grazing farms; the rents were payable half-yearly at the terms subsequent to the date of entry, but the right of the proprietor to each half-yearly payment vested at the term preceding and transmitted to his executors, who were accordingly entitled to uplift the rents accruing at the term next ensuing the ancestor's death.[1]

Effect of conventional postponement of the term of payment.

405. Rents of land, when conventionally postponed, are in the same situation as arrears in relation to the rights of executors. Rents postponed are held as being vested in the proprietor at the legal terms, although payment cannot be demanded until the arrival of the terms stipulated. In all cases, therefore, such rents, if vested prior to the ancestor's death, are part of the executry estate.[2]

406. Where, in a grass farm, the whole rent is made payable at Martinmas ensuing the term of entry, if the proprietor dies before Martinmas, his executor is only entitled to the half of the rent which vested *ex lege* at the preceding Whitsunday. If the proprietor survive the term of Martinmas, the executor is entitled to the whole.[3]

Distinction between crops and natural grass, where subject is unlet.

407. We have already seen that growing crops are regarded as moveable property, and therefore, on the death of an heritable proprietor who was in the occupation of his own estate, these form part of his executry estate.[4] But the executors have no right to the use of the natural grass during the remainder of the term current at the proprietor's death, this being a fruit which requires no yearly seed or industry.[5] Hay of the second crop from grass seeds grown with wheat crops has been held heritable in a question of succession.[6]

Effect of adjudication *per se*, and in competition with arrestment.

408. In all cases of termly payment an adjudication before the legal term will carry the right which vests at that term. An arrestment after a term will carry the rent due at that term, and an adjudger after an arrestment will be postponed to the arrester in relation to the termly payment in question. But a distinction has been recognised between interest payable on an heritable bond and interest falling due under an adjudication. In the former case an adjudication of the bond and debt is held to carry the principal subject and future interests, but not the arrears; in the latter the

[1] *Binny* v. *Binny*, 28 Jan. 1820, F.C.; *King* v. *Jaffray*, 24 Jan. 1828, 6 Sh. 422.

[2] *Carnegy* v. *Carnegy's Crs.*, 1668, M. 15,887; *Innes* v. *Duke of Gordon*, 13 Nov. 1822, 2 Sh. 3, N.E. 2; *Trotter* v. *Cunningham*, 26 Nov. 1839, 2 D. 140.

[3] *Petley* v. *Mackenzie*, 1805, Hume, 186; *Campbell* v. *Campbell*, 1745, M. 15,908.

[4] *Supra*, § 369.

[5] Ersk. 2, 9, 65.

[6] *Wight* v. *Inglis*, 1796, M. 5446; *M. of Tweeddale* v. *Somner*, 19 Nov. 1816, F.C.; *Keith* v. *Logie's Heirs*, 3 Dec. 1825, 4 Sh. 267, N.E. 272; and see *Gordon* v. *Gordon*, 1806, Hume, 188.

adjudication of the debt and diligence carries the adjudication with the whole accumulated sum and interest, including arrears. This distinction was established on the view that an adjudication was equivalent to a sale under reversion; and although the case of *Cochrane* v. *Boyle*[1] appears to have discountenanced that doctrine, and reduced adjudication to the category of a pledge, the rule that the diligence incorporates interest with the principal is well established in practice, and cannot be considered to have been shaken by that decision.[2]

409. II. APPORTIONMENT ACT, 1870.—It is only necessary to quote the 2d and 3d sections, which are—section 2, "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Section 3: "The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before." Section 4 provides in substance that the rent shall be received by the heir, who shall account to the executor for his apportioned part thereof.

410. Very few questions have been raised under this Act; indeed there seems to be no room for any question excepting this, —Which is the termly payment that is subject to apportionment? On this question, the decisions which have been given in parallel cases arising under the Apportionment Act, 1834, would seem to be very much in point. The principle of construction being that the Act gives to executors a right which they could not otherwise claim, it is only necessary to find out which is the last termly payment that could be claimed by the executors according to the rules of the common law; then the payment immediately following this is the payment to be apportioned. Such was the method followed in the entail case of *Campbell* under the earlier Act of Parliament;[3] and it is the principle which was applied by the

[1] *Bogle* v. *Cochrane*, 25 March 1850, 7 Bell, 65.

[2] See 2 Bell's Com. 7th ed. p. 9; *Ramsay* v. *Brownlie*, 1738, M. 5538; Elchies, "Adjudication," 20; *Baikie* v. *Sinclair*, 1786, M. 5545; *Ryder* v. *Ross' Crs.*, 1794, M. 5549.

[3] 11 D. 1427.

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Lord President Inglis, in a case of forehand rents, to the construction of the Act of 1870. The case referred to is that of *Lord Herries*, where the Lord President quotes the passage above cited from Kilkerran to prove that the forehand payment, which was made shortly before the death of the proprietor, vested wholly in the executor, and thence deduces the inference that the payment made at the next ensuing term is apportionable under the Statute of 1870.[1]

Law antecedent to the Apportionment Act.

411. III. DIVISION UNDER THE APPORTIONMENT ACT, 1834.—We have to consider the right of the executor of a person whose interest terminates at his death (as a liferenter, heir of entail, or annuitant), in competition with the reversioner or successor. It has generally been assumed that the Apportionment Act of 1870 supersedes the Act of 1834, because, according to its terms, the Act of 1870 is perfectly general in its operation. But as the principle of apportionment is the same under the two Statutes, the writer has retained the greater part of what appeared in the earlier edition regarding the construction of the Act of 1834, conceiving that decisions on questions arising under it may be of use as a guide to the construction of the later Statute.

412. The rules by which the interest of the executor of a liferenter is discriminated in a question with the fiar, as laid down by Erskine,[2] are identical with those which have been explained in treating of the rights of heirs and executors of a fiar. In the case of annuities, whether secured on heritage or constituted by personal bond payable at the usual termly periods, the executor had right to the arrears of interest vested and unpaid. Rents of heritable estate were understood to vest in accordance with the rules formerly explained, and the executor was entitled to the outstanding arrears.[3] In all cases to which the Apportionment Act was inapplicable, the rights of the executors of a liferenter, or other person whose interest is determined by his death, were regulated by the common law, on the principles which have been explained in the first subdivision of this section.

Object of the Apportionment Act.

413. The rights of the executors of deceased persons whose interest is determined by their death, was extended by the second section of the Apportionment Act, 1834,[4] a statute which appears to have been framed with exclusive reference to the law of England, but which was found, in the case of *Bridges* v. *Fordyce*,[5] to extend to Scotland. Although the statute does contain expressions which

[1] *Lord Herries* v. *Maxwell*, 1873, 11 M. 396.

[2] Ersk. 2, 9, 64-66.

[3] Ersk. 2, 9, 66; 2 Bell's Com. 7th ed. p. 8; *Baillie* v. *Cuthbert*, 1684, M. 15,900.

[4] 4 and 5 Will. IV., cap. 22, § 2.

[5] *Bridges* v. *Fordyce*, 7 March 1844, 6 D. 968; 23 Feb. 1847, 6 Bell, 1.

have exclusive reference to the law of England, yet its general provisions, with which we are immediately concerned, are neither unintelligible nor inappropriate to the relations of heir and executor under our own legal system. The primary question for consideration is the extent of the application of the Act. Two propositions, one of them of considerable importance, have been settled, not without some conflict of opinion and authority.

Act not applicable to fee-simple estates.

414. In the first place, it is a settled point that the Statute does not apply to the regulation of the interests of the heirs and executors of a proprietor in fee-simple. This becomes apparent on a careful consideration of the somewhat involved phraseology of the 2d section of the Statute, which is as follows:—"And be it further enacted, That from and after the passing of this Act all rents service, reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this Act), and *all rents charge, and other rents, annuities,* pensions, dividends, moduses, compositions, *and all other payments of every description* in the United Kingdom of Great Britain and Ireland, *made payable or coming due at fixed periods* under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act, *shall be apportioned so and in such manner that on the death of any person interested* in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, *or on the determination by any other means whatsoever of the interest of any such person, —he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities,* pensions, dividends, moduses, compositions, *and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively* (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions,

dividends, moduses, compositions, and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this Act had not passed, would have been entitled to such entire rents; *and such portions shall be recoverable from such person or persons by the parties entitled to the same* under this Act, in any action or suit at law or in equity."[1]

Apportionment arises on the death of person whose interest is determined by death.

415. Rejecting the redundant phraseology, the substance of the provision may be expressed as follows:—All rents, annuities, and other payments due at fixed periods under any instrument that shall come into operation after the passing of the Act, shall be apportioned so that on the determination by death or otherwise of the interest of the person entitled thereto, he or his executors shall be entitled to a proportion of the payment due in respect of the current termly period corresponding to the time which shall elapse from the date of the last termly payment, such proportion to be recovered by the executor from the person entitled to the reversion. The apportionment contemplated by the Act only arises therefore upon the death of a person whose death causes the determination of his interest, *i.e.*, whose interest is not transmissible to his heirs. This was held to be the correct reading of the Act in *Browne* v. *Amyott*,[2] where Vice-Chancellor Wigram decided that the Statute did not apply to the case of a tenant in fee (*i.e.*, proprietor in fee-simple), or provide for the apportionment of rent between the real and personal representatives of such person whose interest is not terminated at his death. The words "determination by any other means," occurring in the immediate context, were held to limit the meaning of the word "death" in such a manner as that it must be understood in the sense of a death occasioning the determination of the interest.[3] Accordingly, in *Lock* v. *De*

[1] The Act consists of three sections. Section 1, which is explanatory of the provisions of the English Statute 11 Geo. I., cap. 19, does not apply to Scotland (see *Bridges* v. *Fordyce*, *supra*); sect. 2 is quoted in the text; sect. 3 enacts, "That the provision herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description." The words "expressly stipulated," as applied to a will, have been held to require either an express direction that there shall be no apportionment, or language so expressed in the terms of the gift that apportionment is clearly impossible consistently with it. Inference from the whole tenor and context of the will is not sufficient—*Tyrell* v. *Clark*, 2 Drew. 86.

[2] *Browne* v. *Amyott*, 3 Hare, 173.

[3] *Beer* v. *Beer*, 12 C. B. 60. *In re Clulow's Estates*, 3 Kay & J. 689. In the former case Mr. Justice Maule observed, "The whole scope and object of the 4 and 5 Will. IV., cap. 22, seems quite beside any dealing or interference with

Burgh,[1] it was held that where real estate is conveyed or settled so that the first taker has an estate for life, the Act will apply. These decisions are impliedly confirmed by that of the House of Lords in *Baillie* v. *Lockhart*,[2] where it was determined that the Statute applied to the apportionment of rents between the heir and the personal representatives consequent on the death of an heir of entail, the argument on the other side proceeding on an attempt to assimilate the position of an heir of entail to that of a proprietor of a fee-simple estate. Commenting on this case, the Lord President Inglis observed that the question there put was, "Whether the deceased had a *jus disponendi*? If he had not, then his interest in the estate terminated with his death; if he had, it did not. On that conclusive test the judgment of the House of Lords proceeded, which was, that the executor of the heir of entail was entitled to the benefit of the Statute, because he had only a life interest, and could not dispose of it."[3]

Application of the statute to limited interests in personal estate.

416. The Act appears to be applicable to the apportionment of termly payments due upon investments or other *personal estate*, between the liferenter's executor and the fiar or person entitled to the reversionary interest. Thus, where a testator, after directing a fund to be formed by the investing the rents of his estate in the purchase of bank annuities, charged it with payment of £150 a year to his wife during her life, it was held by Shadwell, V.-C., that, though the £150 was not a continuing payment, the executors of the wife—she having outlived the testator—were entitled under the Statute to a proportionate part of the £150 a year for the interval between her death and the last preceding yearly day of payment.[4] Dividends declared by joint stock companies, subject to the Companies Clauses Consolidation Act, are held not to fall within the scope of the Act, as not being due at fixed periods;[5] but where the deed of settlement of a joint stock company directed that the profits should be divided half-yearly, each dividend to be paid in two specified months, it was held that such dividends were apportionable under the Act with reference to the days on which they were made payable.[6] The Act does not apply to royalties

the rights of the tenant in fee, as between him and the personal representative of his ancestor. That struck me as the proper view when I first read the Statute, and I am confirmed in that impression by the decision of Sir James Wigram, V.-C., in *Browne* v. *Amyott*, of the soundness of which I cannot entertain a doubt."

[1] 20 L.J. Ch. 384.

[2] *Baillie* v. *Lockhart*, 23 April 1855, 2 Macq. 258. These decisions have been acquiesced in, as settling the non-applicability of the Statute to fee-simple proprietors; and accordingly legacy duty is not exacted by the Board of Inland Revenue in such cases on the proportion of the current rent corresponding to the period preceding the death of the proprietor.

[3] *Bannatine's Trs.* v. *Cunninghame*, 1872, 10 M. 325.

[4] *Carter* v. *Taggart*, 16 Sim. 447; *Wardroper* v. *Cutfield*, 33 L.J. Ch. 605.

[5] Williams on Executors, 8th ed. 839.

[6] *Re Maxwell's Trusts*, 1 Hem. & M. 610.

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payable on minerals at so much per ton, or to payments to be made at uncertain periods.[1]

Import of the expression "by other means" than death.

417. It will be observed that the Statute refers to the determination of the interest by death or "by any other means whatsoever." What are the "other means," besides death, which may terminate an interest, on the determination of which the apportionment is to take place? This question does not appear to have been resolved by any authority, although there is one decision which shows what *does not* fall within this part of the Statute. A person was hired by deed to undertake "the offices of auditor and superintending manager of the estate of another person, at a salary of £1800, payable half-yearly on the 7th July and 7th January in every year." The employer revoked the appointment in the the middle of a current year. It was held that the manager could not recover under the Statute a proportionate part of the salary in respect of that portion of the year during which he held the offices. The Court were of opinion that the Statute applied only to cases where payment for the whole year *must* be made to *some* person, and did not include a payment under contract between employer and employed for services where payment entirely ceased upon the determination of the claimant's right to receive it.[2] The words "by any other means" may possibly have relation to the case of the death of an assignee of a life interest during the lifetime of the cedent on whose life it is dependent. They have been held applicable to the case of the expiration of a term of years during which trustees were directed to accumulate rents for payments of debts, &c., with remainder to a liferenter.[3]

Import of the expression "payable under any instrument."

418. Further, it will be observed, the Act speaks of rents "reserved by any lease,"[4] and again of annuities, &c. payable under any "instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act." In consequence of these words, it was long considered a subject of doubt whether the "instrument" referred to was the lease, bond, &c. under which the money was payable, or the deed of settlement creating the

[1] *St Aubyn* v. *St Aubyn*, Drew. & Sm. 611; 30 L.J. Ch. 917.

[2] *Lowndes* v. *Lord Stamford*, 18 Q.B. 425, 21 L.J. Q.B. 371. And it would appear that the Act does not apply to the termination of a lease by the act of the proprietor, under a power to that effect; *Oldershaw* v. *Holt*, 12 Ad. & E. 590.

[3] *St Aubyn* v. *St Aubyn*, 1 Drew. & Sm. 611.

[4] The Act does not apply to leases depending for their establishment on entries in the rental-book of the estate. "The terms of the Statute in reference to this matter are such as to apply to any system of jurisprudence, and have a general, or what may be called a cosmopolitan, meaning. No one can doubt the meaning of the words 'execution of a written instrument.' An entry in a rental-book is not an instrument;" *E. of Dalhousie* v. *Crokat*, 1868, 6 M. 664, per Lord President Inglis.

limited interest at the determination of which the money was to be apportioned. The result of the cases, as stated by Mr. Justice Williams,[1] is that the Act applies where either the lease or the settlement is subsequent in date to the Statute. It was ruled in *Knight* v. *Boughton*[2] that the words of the section apply to all cases where the instrument creating the life interest was executed after the passing of the Act; while, in other cases, the Court has applied the Act to the apportionment of rents due under leases which were granted after the passing of the Act, under powers in settlements executed before the passing of the Act.[3] The decisions of the Court of Session with reference to apportionment of rents between heirs of entail and executors are entirely favourable to latter construction.[4]

419. The chief difficulties in the application of the provisions of the Apportionment Act to Scotland have arisen from the arbitrary distinctions established by the common law in relation to the vesting of rents of different descriptions of property. The decisions of the Court of Session in the two cases of *Campbell* v. *Campbell* and *Blaikie* v. *Farquharson* (decided at the same time) appear to proceed upon different principles, and are in other respects unsatisfactory. The case of *Campbell*[5] had reference to the rents of a grass farm, where the proprietor died in the interval between Whitsunday and Martinmas, and where, therefore, his executors were entitled at common law to the rent which vested at Whitsunday, and was payable at Martinmas. It would naturally be supposed that this was the rent which fell to be apportioned under the Statute, because it was the rent "payable or coming due" for the term current at the death of the proprietor. The Court, however, considering that the object of the Statute was to enlarge the rights of the executors, or younger children of landed proprietors, found them entitled to the whole of that term's rent, together with a proportional part of the rent due at the ensuing term of Martinmas, and payable six months thereafter. In the case of *Blaikie* v. *Farquharson*,[6] the rents were postponed for half a year; and, as we understand the case, the rent which was held to be subject to apportionment was the postponed rent applicable to the termly period during the currency of which the death took place. This

[1] Williams on Executors, 8th ed. 839.

[2] *Knight* v. *Boughton*, 12 Beav. 312; and see *Michell* v. *Michell*, 4 Beav. 549; *Wardroper* v. *Cutfield*, 33 L.J. Ch. 605.

[3] *Plumner* v. *Whittley*, Johns. 585; *Lock* v. *De Burgh*, 20 L.J. Ch. 384. The Act does not apply to rents payable on verbal leases from year to year. *In re Markby*, 4 My. & Cr. 484; *Cattley* v. *Arnold*, 1 Johns. & H. 651.

[4] *Baillie* v. *Lockhart*, *supra*; *Campbell* v. *Campbell*, 18 July 1849, 11 D. 1427; *Blaikie* v. *Farquharson*, 18 July 1849, 11 D. 1456.

[5] *Campbell* v. *Campbell*, *supra*.

[6] *Blaikie* v. *Farquharson*, 11 D. 1496.

decision appears to be correct in principle. In *Paul* v. *Anstruther*,[1] the personal representative of a deceased heir of entail was held bound to allow a deduction out of the share of the rents accruing to him under the Apportionment Act, on account of an annuity, payable in advance, to the widow of the heir of entail represented, and commencing at the period of his death.[2]

[1] *Paul* v. *Anstruther*, 15 Feb. 1864, 2 M. (H.L.) 1, affirming 1 M. 14.

[2] In the same case, it was held that the deceased heir's personal representative had no right to repayment of a proportion of an annuity, payable to the widow of a former proprietor at half-yearly terms, and one-half of which had been paid by advance shortly before the date of the decease.

CHAPTER XI.

CONSTRUCTIVE CONVERSION OF HERITABLE OR MOVEABLE ESTATE.

1. Conversion in relation to the Succession of the Beneficiary.
2. Effect of a Direction to convert on a Destination to the Truster's Heirs.
3. Reconversion and Election to take in forma specifica.
4. Properties of the Converted Estate.

SECTION I.

Conversion in relation to the Succession of the Beneficiary.

420. I. Conversion of the Beneficiary Interest from Heritable to Moveable.—The principle of the constructive conversion of heritable into moveable estate may be put in a very simple form. If a truster, expressly or by implication, directs his trustees to sell his heritable estate, and to pay or divide the proceeds in any manner, the right of a beneficiary under the trust, being a right to a payment in money, is moveable estate in his person. This quality of the beneficiary interest, being impressed on it by the will or act of the truster, is independent of the action of his trustees, and therefore the beneficiary estate, or share of residue pertaining to a beneficiary, will descend as moveable estate to his testamentary or legal representatives, notwithstanding that the trust for sale has not in fact been executed. This is the fundamental rule, and a second rule has been deduced from it, which is, that if it is left to the discretion of the trustees to sell or not to sell, or if the direction to sell be conditional on an event, then the quality of the beneficiary's estate will depend on the exercise of the discretion or the occurrence of the event.

421. Constructive conversion has been recognised as a doctrine or principle of the law of Scotland ever since the introduction of wills in the form of trust-deeds containing powers of sale; it is a particular case of the principle of trust administration, *quod fieri debet infectum valet.* But the law on this subject has been largely developed within a period so recent as the last twenty or thirty years, and for practical purposes it is unnecessary to consider the

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decisions antecedent to *Blackburn's Trustees* in the Scottish Court of Exchequer and *Buchanan* v. *Angus* in the House of Lords.[1] One other preliminary observation may be useful. The revenue cases which figure in the Reports of the first half of the present century depend on the provisions of the Act of Parliament imposing a duty on legacies and residue, and according to that Act[2] legacy duty is payable on real or heritable estate directed to be sold, as if it were moveable. In order to avoid the operation of this Act, testators were advised not to use words of express direction or trust even when it was intended that the estate should be sold and the proceeds divided. But in this class of cases the Scottish Court of Exchequer leaned strongly towards conversion; a power was held to be equivalent to a direction wherever it appeared to the Court that, in the ordinary and due course of administration, lands ought to be sold or heritable bonds called up for the purposes of distribution; and in such cases legacy duty was held to attach. In the later cases on constructive conversion, the Court has in general declined to regard the revenue cases as of equal authority to those in which a question of succession was directly raised;[3] but the Exchequer cases cannot be altogether neglected, because the definition of constructive conversion which was given by Lord Fullerton in one of these cases was adopted by the House of Lords in the leading case of *Buchanan* v. *Angus*,[4] and may be said to be the foundation of the second of the rules above given.[5]

422. The cases on this subject are very numerous, and it cannot be said that the law has even yet advanced to the stationary stage, the chief outstanding difficulty being to find a criterion for determining what amounts to an implied direction to sell, or trust

[1] Among the older cases on conversion, as affecting the right of a beneficiary, reference is made to *Durie* v. *Coutts*, 1791, M. 4624; *Grierson* v. *Ramsay*, 1780, M. 759, Hailes, 855; *Wilson* v. *Smart*, 31 May 1809, F.C.; *Ramsay* v. *White*, 1833, 11 S. 786; *Pearson or Gardner* v. *Ogilvie*, 1857, 20 D. 105. The estate was held not to be converted under a power of sale in *Patrick* v. *Nichol*, 1838, 1 D. 207; *Strachan* v. *Mowbray*, 1843, 5 D. 688; *Speirs* v. *Speirs*, 1850, 13 D. 81; *Grindlay* v. *Grindlay's Trs.*, 1853, 16 D. 27; and *Gray's Trs.* v. *Robertson*, 1863, 1 M. 963.

[2] 48 Geo. III., cap. 149, Sch. Part 3, and see 55 Geo. III., cap. 184, Sch. Part 3.

[3] 22 D. 1339, per Ld. J.-C. Inglis; 22 D. 981, per Ld. Pr. Colonsay.

[4] 4 Macq. 374.

[5] The revenue cases in order of date are, *Adv.-Gen.* v. *Williamson*, 1840, Sc. Exch. Rep., and in H.L. 1843, 2 Bell, 89; *Adv.-Gen.* v. *Blackburn's Trs.*, 1847, Sc. Exch. Rep.; *Adv.-Gen.* v. *Smith*, 14 D. 585, and Sc. Exch. Rep., and in H.L. 1854, 1 Macq. 760; *Advo.-Gen.* v. *Hamilton*, 1856, 18 D. 636; *Weir* v. *Adv.-Gen.*, 1865, 3 M. 1007. To these may be added two important English cases, *Att.-Gen.* v. *Mangles*, 5 Mee. & Wel. 120; *Att.-Gen.* v. *Simcox*, 1 W. H. & G. 749.

for sale, as distinguished from a power.[1] In the cases which come before the Courts the truster generally begins by giving his trustees a power of sale, which is sometimes stated to be as ample as the testator himself possessed; and more rarely is qualified by a reference to the necessity of the case, or is safeguarded by being made dependent on the wish or consent of the residuary legatees.

Conversion in relation to landed estates.

423. Now (1.) where the estate conveyed is a substantial land estate, an ordinary power of sale does not operate a conversion from heritable into moveable. So much will be generally admitted, because the testator may be content that his family should possess the estate as beneficiaries *pro indiviso*, or that they should have it divided amongst them specifically, and may yet think it proper to give a power of sale to his trustees to meet emerging circumstances.

Heritable securities.

424. (2.) Where the heritable estate of a truster consisted of nothing more permanent than heritable bonds, and the purposes of the trust were those of a family settlement of moveable estate, the presumption was very strong that moveable interests were intended to be given to the members of the family; but here the question no longer arises, since heritable bonds have become moveable as to succession under the operation of the Titles Act, 1868, and it is now hardly possible that a question of constructive conversion should arise with respect to an heritable security.

Urban subjects, &c. What amounts to a conversion.

425. (3.) Passing to the cases of the ordinary type, where the subjects are house property purchased for investment or resale, shops and factories, feu-duties, conveyances of lands held as covering securities for money lent, and the like,—if the trust is one for immediate distribution, or where distribution is only postponed to secure an income to a wife or a daughter,—it is difficult to avoid the conclusion that the expression of a purpose or intention to divide the value of the estate in money, coupled with an unqualified power of sale for carrying that purpose into effect, amount to a constructive conversion. In the series of decisions, chiefly of the Second Division of the Court, which preceded the seven-judge case of *Sheppard*,[2] this was the ground of judgment announced by Lord Moncreiff, and consistently carried out on the principle of presumed will or intention.[3] The writer is not prepared to dissent in principle from any of these decisions, nor would he be disposed to assent to Lord Moncreiff's observation

[1] As an example of conversion under an express direction to sell, see *M'Gilchrist's Trs.* v. *M'Gilchrist*, 1870, 8 M. 689.

[2] *Sheppard's Trs.* v. *Sheppard*, 1885, 12 R. 1193.

[3] *Mackenzie* v. *Mackenzie*, 1868, 6 M. 375; *Boag* v. *Walkinshaw*, 1872, 10 M. 872; *Fotheringham's Trs.*, 1873, 11 M. 848; *Baird* v. *Watson*, 1880, 8 R. 233; see also *Nairn* v. *Melville*, 1877, 5 R. 128.

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in the case of *Seton's Trustees*,[1] that since *Sheppard's* case the current of decisions has set entirely in the other direction. The later cases of *Kippen's Trustees*[2] and *Brown's Trustees*[3] maintain unimpaired the principle that a power of sale, given with a view to an equitable distribution of the value of the trust-estate within the truster's family, is equivalent to a trust for sale, provided the other necessary conditions exist, *i.e.*, where the heritable property is such as would only be held for investment, and the division is either immediate or is only postponed for reasons connected with the interests of the immediate legatees. In the case last mentioned the present Lord Justice-Clerk pointed out that there had been no case in which a testator used the words "pay" and "payment" only (without the alternative of specific conveyance) where the decision had been against conversion. Of all the elements which affect the question of the intention to convert, the numerical strength of the body of beneficiaries seems to be the least important. It is recorded in one of the cases that at the time of the division there were fifty-two beneficiaries interested in the proceeds of the sale, and yet the estate was held not to be converted.[4] To conclude this part of the subject, the elements which mainly determine conversion are those which are described in the following sentence, taken from one of Lord Moncreiff's judgments:—"It being clear that the heritable property was held only as an investment, that the direction appears to contemplate a payment in money, that there is a considerable number of beneficiaries, and that the bequest is a bequest of residue, everything seems to lead to the result that there was conversion here."[5]

Analysis of the cases where decision adverse to conversion.

426. (4.) So much as to the grounds of judgment which have prevailed in favour of constructive conversion and the claims of personal representatives. Without professing to be able to reconcile all the decisions, it may be affirmed that where the decision has been in favour of the heir, it will in general be found either that the power of sale was qualified, or that some of the elements enumerated by Lord Moncreiff in the passage cited have been awanting.

427. To begin with the case of *Buchanan* v. *Angus*,[6] which was the subject of a considered judgment in the House of Lords, and to which a somewhat exceptional weight has been attributed: the power of sale in that case was qualified by the words "if necessary." Now, according to the judgment of the Lord Chancellor Westbury, concurred in by Lord Cranworth, a power so qualified would not

[1] *Seton's Trs.* v. *Seton*, 1886, 13 R. 1047.

[2] Sp. Ca. *Kippen's Trs.*, 1889, 16 R. 668.

[3] Sp. Ca. *Brown's Trs.*, 1890, 18 R. 185.

[4] *Duncan's Trs.* v. *Duncan*, 1882, 9 R. 731.

[5] Sp. Ca. *Baird*, 1880, 8 R. 235.

[6] 1862, 4 Macq. 374, reversing 22 D. 979.

have the effect of changing the succession unless the necessity for a sale should arise in a due course of administration. But, as in this case the testator left no debts, and according to the will the estate was to be shared by two beneficiaries, their Lordships found that a sale was not indispensable to the execution of the trust, and that the estate ought to be conveyed *pro indiviso* to the appellant, who was the representative in heritage of these persons. It may here be noted that in three trust cases (which preceded the judgment in *Buchanan* v. *Angus*), where the right to the residue belonged to a sole beneficiary, it was rightly held that conversion did not take place, and that the power of sale was only a power, and not a trust for sale.[1] Proceeding to those cases subsequent to *Buchanan* v. *Angus* which have been decided against the heir, and passing over *Melrose*[2] (where the Lord President said that in the view taken regarding vesting it was unnecessary to enter upon the question whether the property was heritable or moveable), we come to the important case of *Auld* v. *Anderson*,[3] which presents two specialties —*first*, that the trust was not one for division amongst the immediate objects of the will, because the trustees were directed not to pay but to hold the residue of the estate for the truster's children, and the survivors of them, whose interests, moreover, were declared to be strictly alimentary; *secondly*, that there was an alternative direction or power, either to sell the heritable property or to apportion and divide it among the six children, words which were construed as meaning a division *in forma specifica*, and which, in the opinion of the Court, were conclusive against the argument for conversion. The same specialties are presented in *Duncan's Trustees*,[4] where the trust was conditioned to subsist until the death of the testator's wife and his seven children, the ultimate direction being "to *denude* in favour of the persons who shall then have right to the different subjects hereby conveyed." Then, as pointed out by Lord Craighill, the power of sale was only applied to a part of the trust-estate, and was given subject to two qualifications—*first*, the consent of the beneficiaries, and, *secondly*, the condition that the proceeds of the sale should be laid out on heritage.[4] The case of *Aitken* v. *Munro*[5] was considered by the Lord Ordinary and the Court to be an example of the second rule referred to in the commencement of this chapter, *i.e.*, that where trustees under a con-

Case of a discretionary trust for sale.

[1] *Cathcart* v. *Cathcart*, 1830, 8 S. 803; *Speirs* v. *Speirs*, 1850, 13 D. 81; *Grindlay* v. *Grindlay's Trs.*, 1853, 16 D. 27; and see *Advocate-General* v. *Smith*, 14 D. 585, and Exch. Ca.; 1 Macq. 760; *Somerville's Trs.* v. *Gillespie*, 1859, 21 D. 1148.

[2] *Melrose* v. *Melrose's Trs.*, 1869, 7 M. 1050.

[3] 1876, 4 R. 211, see pp. 215-216.

[4] 9 R. 741. On the effect of such a qualification of the power of sale, see also *Gray's Trs.* v. *Robertson*, 1863, 1 M. 936.

[5] 1883, 10 R. 1097.

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tinuing trust are charged with a discretionary power or duty, either to sell or to retain the property, as time and circumstances should render expedient, the conversion will be determined by the exercise of the power. The Lord President says[1]—"It is impossible to resist this conclusion upon the interpretation of the deed, that the trustees were invested with an ample discretion to retain the heritable estate or to sell it, whichever they might think the most expedient, or whichever they might find to be necessary in the execution of the purposes of the trust." Such a discretion is, of course, not the same thing as a discretion to sell. His Lordship also remarked on the fact that for more than half a century the heritable property had remained unconverted in the hands of the trustees. In the seven-judge case of *Sheppard*,[2] it must be admitted that there was room for difference of opinion, because the Court was not unanimous; but the argument against conversion, which secured the support of five of the seven judges, was of the same character as that in the preceding cases; in the will the ultimate direction to the trustees was, "to divide the whole residue of my means and estate, and to dispone, convey, and make over," &c., words which certainly point to a conveyance *in forma specifica*. Here also the power of sale given to the trustees was qualified by a declaration that it was not to be used so as to affect the liferent right of the testator's widow; in other words, there could not be a complete conversion as at the testator's death, but only a sale under burden of the liferent. Lastly, there is the case of *Seton's Trustees*,[3] where, with an alternative direction either to sell the heritage and divide the proceeds, or to convey the property specifically to the children of the truster, their Lordships of the Second Division, including the judges who dissented in *Sheppard*, were unanimously of opinion that this could not be interpreted as an unqualified trust for sale, and that the estate was to be treated as unconverted.

Lord Westbury's criterion of conversion.

428. The subject may fittingly be concluded by quoting the more important sentences of the Lord Chancellor's judgment in *Buchanan* v. *Angus*.[4] "The principle or doctrine of conversion," he says, "appears to be the same both in England and in Scotland. Conversion is a question of intention, and depends on the nature and effect of the direction given in any settlement or will." Then he takes the case, in the first place, that there is a direction to sell, the effect of which is undoubtedly to operate a conversion. "But," he continues, "if instead of an absolute and unqualified trust or direction for sale, the right to sell is made to depend on the

[1] *Aitken* v. *Munro*, 10 R. 1104.
[2] *Sheppard* v. *Sheppard's Trs.*, 1885, 12 R. 1193.
[3] *Seton's Trs.* v. *Seton*, 1886, 13 R. 1047.
[4] *Buchanan* v. *Angus*, 4 Macq. 379.

discretion or will of the trustees, or is to arise only in case of necessity, or is limited to particular purposes, as, for example, to pay debts, or is not, in the appropriate language of Lord Fullerton in the case of *Blackburn*, "indispensable to the execution of the trust,"—then in any of these cases, until the discretion is exercised, or the necessity arises and is acted on, or after the particular purposes are answered, or if the sale is not indispensable, there is no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable. . . . These principles are clearly deducible in Scottish law from the cases of *Durie, Patrick, Blackburn, Williamson, and Pearson*,[1] which have been cited at the bar."

429. When considered with reference to the facts of the case under appeal, the object of the speaker being to set forth a clear exposition of the grounds of reversal of the judgment of the Court below, while recognising the value of previous decisions of that Court, it does not appear that these expressions were intended to lay down a rule or course of construction hostile to constructive conversion, but rather to guard against the extension of this useful doctrine to cases and in a degree which might conflict with the existing law of primogeniture in relation to heritable succession.

Moveable estate directed to be invested in land descends as heritage.

430. II. CONVERSION FROM MOVEABLE INTO HERITABLE.—There is a well established rule of law to the effect that a direction to invest money in land, to be settled on selected heirs, impresses the character of heritable succession on the estate, so that not only the capital fund, but the interest and proceeds accruing from it, will descend to the heirs of the destination.[2] We refer of course to such interest and proceeds as come into the hands of trustees, which follow the estate as accessories, and are either accumulated with the principal, or are payable, in default of a direction to accumulate, to the heir of the destination for the time being;[3] for, as to interest already paid, that must go as personal estate to the executors of the heir to whom it has been paid or is due.[4]

[1] These cases are cited in notes 1 and 5, p. 224, *supra*.

[2] *Stair* v. *Stair's Trs.*, 29 Mar. 1825, 1 W. & S. 72, affirming 2 Sh. 205, N.E. 182; see the second action, 2 W. & S. 414, reversing 4 Sh. 483, N.E. 488; and 2 W. & S. 614, reversing 5 Sh. 476, N.E. 449; *Howat's Trs.* v. *Howat*, 17 Feb. 1838, 16 Sh. 622; *Campbell's Trs.* v. *Campbell*, 30 June 1838, 16 Sh. 1251; *Macpherson* v. *Macpherson*, 11 June 1852, 1 Macq. 243; *Sitwell* v. *Barnard*, 6 Ves. 520, referred to by Lord St Leonards in *Macpherson's* case; *Dickson's Tutors* v. *Scott*, 2 Nov. 1853, 16 D. 1; *Moncrieff* v. *Menzies*, 25 Nov. 1857, 20 D. 94.

[3] See Chapter LVI., Section II.

[4] In the *Adv.-Gen.* v. *Stair's Trs.*, 15 July 1850, Exch. Rep., it was decided that legacy duty was exigible under 36 Geo. III., cap. 32, in respect of the enjoyment by an heir of entail of the interest and proceeds of trust money directed to be invested in land, as on an annuity for life of the annual amount of such interest and proceeds.

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In trusts for the purchase of land, the purchase money follows the destination.

431. On this principle, where a testator directed his executors to purchase the estate of C. in F., or another estate of equal value, and to settle it on heirs-male; and the free fund, after payment of debts and legacies, amounted to only £750, which was obviously insufficient for the purpose; and the institute, after attaining majority and drawing several years' interest on the above sum, died, leaving a daughter, who claimed the succession as his executor,—the Court repelled her claim,[1] and adjudged the fund to belong to the heirs who were entitled to succeed to the entailed estate under the destination, on the ground that the money, so long as it remained in the custody of the trustees, was a *surrogatum* for the landed estate which the testator had intended to give.[2]

Direction to invest on heritable security does not change the quality of the succession.

432. Prior to the commencement of the Titles Act, 1868, it was often a question of difficulty whether a direction to invest trust money on heritable security would impress the quality of heritable succession on the beneficial interest. There is certainly room for the distinction which has been taken between the cases of a direction to purchase land and a direction to invest upon heritable security, because heritable security is the recognised legal investment for trust money, and such investment, when made by the trustee in the ordinary course of administration, do not affect the succession to the estate. It was decided that a direction to invest upon heritable security, "for securing" payment of an annuity, leaves the fund in the condition of personalty;[3] and again that a direction to invest money in heritable or personal security left the succession unaltered, on the ground that an alternative direction had only the force of a power.[4] The case of *Romanes* v. *Riddell*[5] decides that a positive direction to invest in heritable security changes the succession from moveable to heritable, but this no longer affects the rights of heirs and next of kin, and can at most only be important as determining whether legitim is due from such investments, or whether the widow of a beneficiary is entitled to legitim or to terce out of the invested money.

[1] *Fergusson* v. *Fergusson*, 15 Feb. 1834, 12 Sh. 456.

[2] The case of *Dick* v. *Gillies*, 4 July 1828, 6 Sh. 1065, although erroneous in so far as it extended the doctrine of conversion to *intestate* succession, is a good authority for the doctrine in its general application.

[3] *Carfrae* v. *Carfrae*, 3 Feb. 1842, 4 D. 605. Lord J.-C. Hope observed, that in order that such a direction should have the effect of rendering the fund heritable, there must be an actual destination of the fee of the particular sum.

[4] *White* v. *White*, 28 June 1860, 22 D. 1335.

[5] *Romanes* v. *Riddell*, 13 Jan. 1865, 3 Macph. 348.

SECTION II.

Conversion in relation to the Succession of the Truster.

If the purpose fail, land directed to be sold results to the heir-at-law; money directed to be invested in land results to the next of kin.

433. I. Effect of a Direction to convert on lapsed Succession.—If a truster, while directing his trustees to convert his estate into property of a different quality for the purposes afterwards expressed, should either inadvertently or by design leave a certain share of the succession undisposed of, no inference can be drawn, so far as that share is concerned, of any testamentary purpose, and it may be assumed that in directing a conversion the truster had no other object in view than that of facilitating the realisation of the estate which he had disposed of. The same reasoning is applicable to the case of a direction to convert for the benefit of parties who fail by predecease or otherwise; for when the purpose fails, the intention deducible from that purpose fails also. Upon these general considerations, Lord Loughborough, in *Collins* v. *Wakeman*,[1] and afterwards Lord Cottenham in the important case of *Cogan* v. *Stevens*,[2] decided that, in the absence of any direction as to the disposal of the proceeds of real estate, and also in the parallel case of a failure of heirs under a destination of personal estate directed to be invested in land, the succession remained unconverted. It is now settled in the law of England by the leading case of *Taylor* v. *Taylor*,[3] that land directed to be sold with a view to the execution of certain purposes, results to the heir-at-law whatever be the cause of the failure of the trust purpose.

Analysis of the decisions on this point.

434. The principle of the English decisions appears to be sound, and is applicable to questions of the succession to lapsed interests under Scottish testamentary instruments. There is indeed a decision to the contrary in the much canvassed case of *Dick* v. *Gillies*.[4] That case was already overruled on another point by the case of *Lord* v. *Colvin*;[5] and it was observed in the last edition that on the point immediately in question its authority must be regarded as greatly shaken by the opinions delivered in *Neilson* v. *Stewart*,[6] to the effect that a direction to convert an heritable estate into move-

[1] *Collins* v. *Wakeman*, 2 Ves. jun. 683.

[2] *Cogan* v. *Stevens*, 1 Beav. 482, 5 L.J. Ch. 17; see previous note.

[3] *Taylor v. Taylor*, 22 L.J. Ch. 742 (overruling *Phillips* v. *Phillips*, 1 My. & K. 643). "The result of the authorities," said Lord Cranworth, "is, that where there is a direction to sell real estates, and that the proceeds shall form part of the personal estate, the true construction is, that the conversion takes effect so far as is necessary to carry out the objects and intentions of the testator; but where the object fails, the direction does not take effect" (22 L.J. Ch. 744).

[4] *Dick* v. *Gillies*, decided by the whole Court, 4 July 1828, 6 Sh. 1065.

[5] *Lord* v. *Colvin*, 7 Dec. 1860, 23 D. 111.

[6] *Neilson* v. *Stewart*, 3 Feb. 1860, 22 D. 646.

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able, without giving it to any one, was a mode of proceeding which could not affect the interests of the heir-at-law. The weighty opinion of Lord Curriehill in *Pearson* v. *Ogilvie*[1] tended in the same direction, although the question there was complicated by the existence of an ultimate destination to the truster's heirs. The principle is now definitely settled against the application of constructive conversion to cases of lapsed succession by concurring decisions of the two Divisions of the Court. In the first of these cases, *Thomas* v. *Tennent's Trustees*, the distinction is very forcibly stated in the note of Lord Barcaple, whose judgment on this point was affirmed in the Second Division. "He knows of no authority for holding that an absolute direction to trustees to sell, where the beneficial purpose for which the sale was to be made has failed, or has been revoked, changes the character of the estate from heritable to moveable in the succession of the truster, or is an implied and operative direction to pay the price to his executors. On the contrary, he is of opinion that, on all the analogies to be drawn from the established rules of law in regard to succession and settlements, the maker of the deed must be held to have died intestate in regard to property in that position; and that the nature of his succession cannot be affected by his inchoate or abandoned purpose to settle it in favour of strangers. It is, indeed, a well-established rule of law that an absolute direction to sell makes the property moveable in the succession of the beneficiaries, although the sale may not have taken place or the time for it arrived at their death. The obvious ground of that rule is that the beneficiaries could never get the subject of the bequest except as moveable property; and it has no application to the totally different question as to the effect of such a direction on the intestate succession of the truster himself."[2] In the other case referred to, the judges of the First Division were unanimous, the Lord President observing—"The rule of law is clearly established, that to disinherit the heir, or to defeat the executor, it is necessary not only so to deal with the estate as to effect conversion, but to give it to some other person. . . . On this point I entirely agree with the law as stated by Lord Curriehill in the case of *Gardner* v. *Ogilvy*, and by Lord Neaves in *Neilson* v. *Stewart*."[3]

435. The principle has been followed in cases raising incidentally a question of conversion, as in *Napier* v. *Orr*,[4] where it was held that the right acquired by next of kin through the heir's collation of specific estate was heritable as to succession; and in *Pringle's*

[1] *Pearson* v. *Ogilvie*, 1857, 20 D. at p. 107; and see the opinion of Lord Corehouse in *Finnie* v. *Comms. of Treasury*, 30 Nov. 1836, 15 Sh. 165; *Grindlay* v. *Grindlay's Trs.*, 16 D. 35, per Lord Ivory.

[2] *Thomas* v. *Tennent's Trs.*, 1868, 7 M. 114, at p. 117.

[3] *Cowan* v. *Cowan*, 1887, 14 R. 670, 675.

[4] *Napier* v. *Orr*, 1868, 6 M. 264.

Trustees v. *Hamilton*,[1] where, under a trust for management and payment of debts, the trustees, with the knowledge of the truster, had invested money in heritable security, and this sum was held to be heritable and not subject to collation, because the investment was virtually the act *inter vivos* of the truster.[2]

[1] 1872, 10 M. 621.

[2] "Since the case of *Ackroyd* v. *Smithson*, 1 Br. C. C. 503," say the learned editors of White and Tudor's Leading Cases, "so celebrated for the elaborate argument of Lord Eldon, then Mr. Scott, it has never been doubted that, where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed-of beneficial interest will result to his heir-at-law, and will not go to his next of kin, although the land may have been actually converted into money" (1 Wh. & T. 2d ed. p. 704, 6th ed. p. 1041). And if a fund, previously impressed with the character of realty by the force of a direction to invest it in the purchase of real property, passes under the beneficiary's general disposition or devise, it will be regarded as realty; and therefore, although, *prima facie*, a general direction to convert the beneficiary's whole estate into money would suffice to *reconvert* the fund impressed with the character of realty, yet a *lapsed* interest in this portion of the beneficiary's succession will fall to the heir-at-law, agreeably to the principle of *Ackroyd's* case; *re Taylor's* Settlement, 9 Hare, 596, 604; and see *Salt* v. *Chattaway*, 3 Beav. 576.

It is immaterial whether the lapse arises in consequence of the predecease of the beneficiary, which was the cases in *Ackroyd* v. *Smithson*, in consequence of the settlor having failed to dispose of a portion of the estate which he had desired his trustees to sell, or from any other cause. In *Watson* v. *Hayes*, 5 My. & Cr. 125, the lapse arose from the settlor having omitted to dispose of a portion of the estate which he appointed to be sold. In *Jessop* v. *Watson*, 1 My. & K. 665, the produce of the settlor's estate was directed to be divided among his children on their attainment of majority or marriage, and the testator's only child died unmarried and in minority. In both cases the purpose of conversion was held to have failed, and the real estate was found to belong to the heir-at-law. See also *Robinson* v. *Taylor*, 2 Br. C. C. 589; *Taylor* v. *Taylor*, 22 L.J. Ch. 742, and cases there cited.

In *Fitch* v. *Weber*, 6 Hare, 145, a testatrix, after directing a sale of her real estate, declared that her trustees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate; for which purpose she declared that such proceeds, or any part thereof, should not in any event lapse or result *for the benefit of her heir-at-law*. She died without having disposed of the residue; and the Court of Chancery, disregarding the disinheriting words, gave the surplus proceeds to the heir-at-law. Vice-Chancellor Wigram observed, that according to the settled course of decisions the heir could only be held to be excluded *for the purposes of the will;* and that, as the testatrix had failed to say who should take the surplus, the law must dispose of it.

The principle, that conversion only changes the succession for the purposes of the settlement, applies also to the converse case of money directed to be laid out in the purchase of real estate; in which case, any undisposed of interest results for the benefit of the settlor's next of kin. The leading case is *Cogan* v. *Stevens*, 1 Beav. 482, note, 5 L.J. Ch. 17, 1 Wh. & T. p. 1047, decided by Lord Cottenham, M.R. In this case the testator had directed that £30,000 should be laid out on the purchase of an estate for the ultimate benefit of certain persons in succession, who all died before the period of vesting, with remainder to a charity. The gift to the charity was held to be void under the Statute of Mortmain, and the question then arose, as Lord Cottenham states it, "Whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin, or to the heir of the

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Distinction between the cases of succession under a trust, and by operation of law.

436. II. EFFECT OF A DIRECTION TO CONVERT ON A DESTINATION TO THE TRUSTER'S "HEIRS."[1]—Where heirs of the truster claim the succession as beneficiaries, *i.e.*, under a grant to "heirs whatsoever," "heirs and assignees," or under any general expression comprehending heirs in moveable as well as heritable succession, the quality of the succession, and the description of heirs entitled to succeed, would seem to be affected by the direction to convert. The case is at least distinguishable from that just considered, where the succession is claimed by the heir as accruing by operation of law, or by reason of the failure of the truster to dispose effectively of the beneficial interest in the property directed to be sold.

Whether conversion for the benefit of heirs-at-law is to be presumed.

437. The distinction between questions of *immediate* succession to trust-estate, arising in consequence of the failure of the truster to distinguish the class of heirs to whom the estate is given, and questions as to the succession of a beneficiary who died before receiving payment of his share, was first brought under the notice of the Court by Lord Curriehill in the case of *Pearson* v. *Ogilvie*.[2] The truster directed her trustees to dispose of the residue of her estate, which consisted partly of heritable property, in such way as

testator. . . . Upon principle, and upon analogy to several well-established rules in equity, it would appear that there is no doubt as to the proper solution of this question." And accordingly his Lordship, overruling some *dicta* of a contrary tendency, gave decree in favour of the next of kin.

The question, in what quality a resulting or lapsed interest descends to the legal successors of the settlor's heir or next of kin—as the case may be—has been much discussed in England. We cannot say that the reasoning, upon which the quality of the succession is held to be changed in the person of heirs of the second order, though not changed in the person of immediate heirs, is satisfactory to ourselves. The point has never been raised in Scotland, and we do not think it incumbent upon us to cite foreign authority in support of what is at best not a very substantial distinction. The reader is referred, however, to 1 White & Tudor, p. 708, 6th ed. p. 1045, for an account of the English doctrine. See also Lord Curriehill's *dictum*, *infra*, § 437.

[1] It would appear that the Court of Chancery, in the interpretation of directions to convert personal property into realty, or the contrary, does not recognise any distinction between cases of immediate succession under the will, and descent through a beneficiary. The doctrine is thus stated in 1 White & Tudor's Leading Cases, 6th ed. p. 978:—"Where money has been bequeathed to be invested in land, for the use of the ancestor *and his heirs*; or where, on the marriage of the ancestor, money has been deposited, either by him or by a stranger, in the hands of trustees, to be laid out in land, to be settled upon himself for his life, remainder to his wife for her life, with remainder to their issue, and in default of issue to the ancestor *and his heirs*; or if, on the marriage of the ancestor, there be a covenant on the part of a stranger to lay out money in the purchase of land to be settled to the same uses, and the ancestor die without issue,—in all these cases the heir of the ancestor, and not his personal representatives, will be entitled to the money laid out in the purchase of land."—*Scudamore* v. *Scudamore*, Prec. Ch. 543; *Disher* v. *Disher*, 1 P. Wms. 204; *Chaplin* v. *Horner*, 1 P. Wms. 487; *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171; *Knights* v. *Atkins*, 3 Vern. 20.

[2] *Pearson* v. *Ogilvie*, 25 Nov. 1857, 20 D. 105.

she might afterwards appoint; and failing such appointment, then to her "nearest heirs or representatives," with power to the trustees, if necessary, to sell her said estate for carrying the trust into execution. No appointment of residuary legatees having been made, the next of kin claimed the succession, founding on various expressions in the trust-deed, which were said to indicate an intention that the power of sale should be carried into execution. As the Court were of opinion that there was no implied direction to sell, but merely a discretionary power, it was not necessary to determine what effect should be given to a direction to sell for the benefit of heirs and representatives. Lord Curriehill observed, "The assumption that a direction to testamentary trustees to sell the testator's heritage after his death imports a destination of the price of such heritage to his next of kin, does not appear to me to be warranted either by authority or principle. . . . Care must be taken not to confound such a case with other two cases, belonging to different categories and regulated by different principles. One of these is the case of the succession to the heir himself; for although he be the party who succeeds to the heritable estate which belonged to his ancestor at the time of his death, even although subsequent to his death it be converted into money by the testator's direction, yet, as what he is entitled to demand is the price, it might be held that, were he to die before receiving payment, his claim for the price would be included in his moveable succession." [1] The other class of cases to which his Lordship referred were the Exchequer cases upon the incidence of legacy duty, which have been noticed elsewhere.

438. Lord Deas dissented from the opinion, and observed, that as the doctrine of constructive conversion depended on the intention of the truster, the question, whether the succession was to go to heirs or executors, designed as beneficiaries, depended solely on the circumstance whether the truster had or had not directed the heritable property to be sold; for, if he had, the result upon succession was the same as if he had sold it himself. "I can see no difference," he said, "in this respect, between those cases which related to the immediate succession of the truster and those which related to the succession of one or more of the beneficiaries."

Direction to sell and to pay the proceeds to truster's heirs and assignees operates in favour of next of kin.

439. The earlier authorities on the question are not conclusive on this point. In *Patrick* v. *Nichol*,[2] a *power* was given to trustees to sell heritable estate for the benefit of certain parties, including the testator's nearest heirs whatsoever (to whom the succession ultimately opened), and the inheritance was held to accrue to the

[1] 20 D. 110.

[2] *Patrick* v. *Nichol*, 7 Dec. 1838, 1 D. 207.

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heir-at-law; but it is assumed in Lord Moncreiff's note that a *direction* to sell, expressed or implied, would have carried the estate to the executors. The same view had been taken in cases of succession accruing to heirs of third parties claiming as *personæ designatæ* of the truster. Thus, in *Cathcart* v. *Cathcart*,[1] where the heirs of an institute called to the succession succeeded to the estate as *conditional institutes* of the granter, the word "heir" was held to apply to the heir in heritage, on the ground that while the trust conferred a power of sale, a necessity had not arisen for carrying that power into execution. It may be observed that this was not a case of succession to a vested interest under a trust-deed, but of immediate succession to the truster himself, under the clause of conditional institution. Again, in the case of *Meiklam* v. *Meiklam's Trustees*,[2] where the succession to a fund settled by marriage-contract devolved, in terms of the destination, to the "heirs and successors whomsoever" of the husband, it was held that the character of the succession, as heritable or moveable, was regulated by the settlement, and not by the nature of the actual investment of the fund. So in the case of *Angus* v. *Angus*,[3] where the parties instituted *nominatim* had predeceased the granter, heritable estate directed to be sold was held to belong to the executors of those parties as conditional institutes, in virtue of a destination to "heirs, executors, and assignees."

Analogous construction where the destination is to the heirs and assignees of a beneficiary.

440. One obvious reason for extending the principle of constructive conversion to the case of heirs nominated designatively, is the inconvenience of assuming a different construction of the term "heirs," according as the succession happens to assume the form of a substitution or of a conditional institution. In the case of a succession accruing by way of substitution, the clause of conversion evidently affects the quality of the succession, because in such a case the right of the institute is to receive a sum of money, and that right is apparently moveable as regards its distribution amongst the persons substituted to him; hence consistency requires that the same construction should be given to it in the case of succession by conditional institution. The cases appear to point to these conclusions; first, that effect must be given to the principle of constructive conversion in all questions between heirs and personal representatives of a person named, whether claiming in the character of substitutes or of conditional institutes; and, secondly, that it is

[1] *Cathcart* v. *Cathcart*, 26 May 1830, 8 Sh. 803.

[2] *Meiklam's Trs.* v. *Mrs Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159. In *Buchanan* v. *Angus*, 15 May 1862, 4 Macq. 374, where there was a destination-over to the "heirs" of the legatees, the question did not arise, the House of Lords having decided that there was no implied direction to convert within the settlement.

[3] *Angus* v. *Angus*, 6 Dec. 1825, 4 Sh. 279, N.E. 283.

impossible to distinguish between the effect of a direction to convert for the benefit of such heirs and the case of a direction to convert for the benefit of the heirs of the truster himself, in default of appointment. Two later cases may be noticed. The first is *White's Trustees* v. *White*,[1] where the judgment of Lord Neaves was affirmed by the Second Division. The trustees were directed to set apart £1000, and to invest the same in heritable or personal security, for behoof of the truster's daughter in liferent, and her "heirs whomsoever" in fee. Their Lordships were of opinion that, as the power of investment gave the trustees an option to invest either on real or personal security, it was impossible to suppose that there could have been any definite intention to convert the estate from heritable to moveable. In *Dundas* v. *Dundas*[2] the settled estate of the wife under the marriage-contract consisted of personal bonds and a heritable bond. After the death of the wife, but before the death of the husband (who had a life interest under the contract), the personal bonds were realised, and the proceeds invested in heritable security. In the event which happened, the wife's estate stood destined "to the heirs of the said Elizabeth Dundas, the wife." It was held that the estate must be shared by the heir and the personal representatives of the wife according to the state of the original investments. It is much to be desired that the law at this point should be cleared by an authoritative decision.

SECTION III.

Reconversion and Election to take in forma specifica.

Act of the trustee cannot alter the quality of the trust-estate, or of the succession to it.

441. In principle, it is clear that, as the omission on the part of the trustee to effect the conversion of the trust-estate leaves the force of the truster's direction unimpaired, so, on the other hand, the actual conversion of the estate by the trustee, whether in pursuance of a power or on the ground of supervening necessity—*e.g.*, where the free funds are insufficient for the payment of debts—will not alter the quality of the succession.[3] It has been decided in several of the Exchequer cases that the incidence of legacy duty does not depend upon the actual situation of the estate at the expiration of the trust;[4] and *a fortiori* it may be

[1] *White's Trs.* v. *White*, 28 June 1860, 22 D. 1335.

[2] *Dundas* v. *Dundas*, 1869, 8 M. 44.

[3] *Wauchope* v. *Wauchope*, 14 June 1737, 1 Cr. St. & Pat. 200; *Davidson* v. *Kyde*, 1797, M. 5597; *Berford* v. *Brown*, 1 June 1832, 10 Sh. 609; *Gray* v. *Walker*, 11 Mar. 1859, 21 D. 709. See the provisions of the Lands Clauses Consolidation Act as to compulsory sales, 8 Vict., cap. 19, §§ 67-8; *Blair's Trs.*, 14 Feb. 1852, 14 D. 496.

[4] *Adv.-Gen.* v. *Williamson*, 23 Jan. 1840, Exch. Rep.; 16 March 1843, 2

assumed that the rights of the beneficiary's heirs and executors, while the estate remains in the hands of the trustees, depend in general upon the nature of the succession as fixed by the testamentary instrument.[1] An heir in heritage, burdened with payment of money provisions to younger children, is a trustee for their interests; and therefore, although he assigns heritable bonds in lieu of a payment in money, the interest of the younger children will continue moveable, and will descend to their executors.[2]

Where trustees are directed to purchase heritable estate for a minor, whether he may elect to take the succession in money.

442. The succession of minors, as regards heritable property, necessarily flows in the channel of law, and is not subject to the testamentary disposition of the minor. Accordingly, it is thought that, in the case of a direction to purchase an estate for a minor, the quality of the succession would not be altered by the election of the latter to take payment of the legacy in cash, but would still be regulated by the ancestor's settlement. In *Scott* v. *Scott*,[3] a husband bound himself by marriage-contract to lay out and secure £5000 to his wife in liferent, and the children of the marriage in fee. He died without laying out the money, and his heir, in implement of the obligation, assigned two heritable bonds for the amount to the widow and children, on which they were infeft for their respective interests. It was held that the share of a child who died in minority was moveable as to succession, on the ground, as stated by the Lord President and Lord Mackenzie, that an option given to invest in heritable or moveable security could not affect the succession, and that the rights of heirs were not to be altered or modified by the operations of parties in the position of administrators. However, it has still to be determined, in the case of a sale of heritable estate by a trustee under a power, if payment in money is made to a minor beneficiary, whether that will not change the character of his succession. It would seem that, as a minor possesses the *power* of testing on his moveable estate, the fact of his dying intestate, after having had the money paid to him in terms of the will, is presumptive of an intention that he intended to leave the money to his next of kin.

Whether a minor can elect to take the specific heritable estate in place of the proceeds of sale.

Conversion by curator of an insane person.

443. The conversion of a lunatic's estate by his curator will not in ordinary circumstances affect the succession; and so it was held in the case of a compulsory sale of land belonging to a lunatic proprietor under the powers of an Act of Parliament.[4] But the con-

Bell, 89; *Adv.-Gen.* v. *Anstruther*, 2 July 1842, Exch. Rep.; *Adv.-Gen.* v. *Blackburn's Trs.*, 3 April 1847, Exch. Rep.

[1] *Meiklam's Trs.* v. *Mrs. Meiklam's Trs.*, 2 Dec. 1852, 15 D. 159; *Nisbet* v. *Rennie*, 18 Dec. 1818, Hume, 221.

[2] *Scott* v. *Scott*, 25 June 1846, 8 D. 892.

[3] *Scott* v. *Scott*, *supra*.

[4] *Moncrieff* v. *Miln*, 16 July 1856, 18 D. 1286; *Kennedy* v. *Kennedy*, 15 Nov. 1843, 6 D. 40.

ditions of the question are materially altered when the sale is carried through at the instance of creditors, or even by the curator himself, under judicial authority, upon the ground of legal necessity. The Lord President Colonsay,[1] in *Moncrieff* v. *Miln*, accordingly reserved his opinion as to the disposal of surplus funds arising from a sale under such circumstances.[2]

Conversion by apparent heir selling under the Statute.

444. In the case of *Emslie* v. *Groat*,[3] it was decided that an apparent heir selling his ancestor's estate without having made up a title by service (and having therefore no vested interest), did not thereby alter the character of the succession, but that the price accrued to the next heir as a *surrogatum* for the landed estate.

Beneficiary may elect to take converted estate in its original quality.

445. It appears that if a beneficiary who is *sui juris* elect to take the trust-estate in its actual condition, instead of taking it in the character impressed upon it by the trust, the exercise of the right of election is sufficient to determine the character of his succession in the event of his death before the transference of the estate has been accomplished. This was one of the grounds on which Lords Ivory and Rutherfurd, in the case of *Grindlay* v. *Grindlay's Trustees*,[4] were of opinion that certain urban subjects retained their heritable character in a question as to the beneficiary's succession, notwithstanding that the truster had *appointed and authorised* his trustees to dispose of them by public or private sale. The beneficiary, who was also trustee, instead of selling the property, had let it on a ten years' lease, and in her trust settlement had referred to it as her heritable estate, conveyed to her by her late husband. Those circumstances, in the opinion of their Lordships, amounted to an election on the part of the lady to take the estate in its character of heritage.[5] In another case it was held that the quality of the

[1] 18 D. 1295.

[2] It was observed by Lord Eldon (*ex parte Phillips*, 19 Ves. 124) that if it was for the advantage of a lunatic, whose real estate was embarrassed by debt, the Court would authorise the sale of the estate rather than allow the personalty to be exhausted; and it appears that in various cases the personal property of lunatics has been applied, under the authority of the Court of Chancery, in ameliorating the condition of the real estate—*e.g.*, in paying off mortgages (*Oxenden* v. *Lord Compton*, 2 Ves. jun. 74), in necessary improvements (*Sergeson* v. *Sealey*, 2 Atk. 414; *Dormer's* case, 2 P. W. 262), repairs, or fines for renewals of leases or admissions to copyholds (*ex parte Grimstone*, Amb. 708; *re Badcock*, 4 M. & Cr. 440. We may observe that in the latter case the judgment authorising the investment of the money in improvement was qualified by the remark that "it would be right that the sum so laid out should retain its character of personalty;" and this *dictum* is confirmed by the decisions *in re Leeming*, 7 Jur. N.S. 115, and *Weld* v. *Tew*, Beatt. 272. See also Lewin on Trusts, 9th ed. 1098.

[3] *Emslie* v. *Groat*, 25 Feb. 1817, Hume, 197.

[4] *Grindlay* v. *Grindlay's Trustees*, 9 Nov. 1853, 16 D. 27. The principle of election or constructive reconversion is also recognised in the cases of *Nicolson's Assig.* v. *Macalister's Trs.*, 2 Mar. 1841, 3 D. 675; *Williamson* v. *Paul*, 15 Dec. 1849, 12 D. 372; and *Gray's Trs.* v. *Robertson*, 19 June 1863, 1 Macph. 936.

[5] 16 D. pp. 34, 36. See *Hogg* v. *Hamilton*, 1877, 4 R. 845.

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succession was not changed by a sale with the consent of the beneficiary, because the price had been allowed to remain as a real burden on the estate.[1]

Effect of election by one beneficiary of a class.

446. If a trust-estate is sold after the death of one or more of the beneficiaries by the direction of the survivors, their election to take the land as money, although it will be available for the purpose of determining the quality of the succession of those who consented to the sale, will not operate as a conversion of the succession of the predeceasing beneficiaries.[2]

Revenue cases.

447. It is perhaps superfluous to add that reconversion is not an element in the revenue cases depending on conversion. The Revenue Acts impose legacy duty on real or heritable property directed to be sold; and the circumstance of the beneficiary having accepted a disposition of the heritage *in forma specifica* is not a reason for depriving the revenue of the duty which accrues under the terms of the testamentary direction.[3] Similarly, a sale made on the order or with the consent of the beneficiary, and not in virtue of a testamentary direction, does not render the estate liable to legacy duty.[4]

[1] *Paul* v. *Home*, 1872, 10 M. 937.

[2] *Strachan* v. *Mowbray*, 21 Feb. 1843, 5 D. 688.

[3] *Adv.-Gen.* v. *Williamson*, 16 March 1843, 2 Bell, 89, affirming judgment of C. of S., 23 Jan. 1840, Ex. Rep.; *Att.-Gen.* v. *Holford*, 1 Price, 426; and see *re Ramsay's Trs.*, 2 Cr. M. & R. 224, note.

[4] The principle of reconversion by the election of the beneficiary has been much discussed in England, and the decisions throw light upon many questions which, under our law, are still regarded as unsettled. The following summary embraces the more important points which have been determined:—

1. Election may be made by a person *sui juris*, either in writing or by parole. Lord Eldon and other judges have expressed the opinion that, although the declaration of the *cestui que trust* would not be admissible in a question with third parties, it was binding *inter hæredes*; *Wheldle* v. *Partridge*, 8 Ves. 236; *Pulteney* v. *Darlington*, 1 B. C. Ca. 237; *Edwards* v. *Countess of Warwick*, 2 P. W. 174; *Chaloner* v. *Butcher*, cited in *Crabtree* v. *Bramble*, 3 Atk. 685.

2. Election to take real property in that character may also be made constructively,—as, for example, by the *cestui que trust* entering into possession of the property, and taking the title-deeds into his custody; *Davies* v. *Ashford*, 15 Sim. 42, 14 L.J. Ch. 473; *Griesbach* v. *Fremantle*, 17 Beav. 314. In *Dixon* v. *Gayfere*, Sir John Romilly, M.R., observed that slight circumstances might be sufficient to raise a presumption of reconversion, and that, in the absence of other facts, the retaining of the lands for a great length of time would be sufficient to induce the Court to come to that conclusion; but in that case the length of possession was insufficient, and the death of the *cestui que trust* without having sold the property, was adverse to the supposition of reconversion, 23 L.J. Ch. 60, see p. 64; and see *Kirkman* v. *Myles*, 13 Ves. 338. And so, where money is to be turned into land, reconversion may be implied from the receipt of the principal, but not of the annual income; *Gillies* v. *Longlands*, 20 L.J. Ch. 441. Reconversion may also be effected by changing the securities on which money is invested, as was found in *Harcourt* v. *Seymour*, 2 Sim. N.S. 12, 20 L.J. Ch. 606, where Lord Cranworth said it was sufficient if the Court saw that the party meant the estate to be dealt with as money, and that it was immaterial whether he knew that, but for his election so expressed, it would have been turned into land.

SECTION IV.

Properties of the Converted Estate.

448. In the preceding sections of this chapter the quality of the converted estate has been considered chiefly in relation to the rights of heirs and executors. Its other properties have been but slightly touched on, and that only in illustration of the general argument. It is sufficiently obvious that an estate in succession, although constructively, or even actually converted by virtue of a testamentary direction, may yet retain certain of the properties of the original estate. Moveable estate converted into heritable at the request of the beneficiary, and personal interests in land reconverted in consequence of the election of the beneficiary to take over the estate specifically, retain their moveable quality so far as to be liable in payment of legacy duty. On the general properties of the con-

To what extent converted succession retains the properties of the original estate.

3. As a general rule, there can be no reconversion by a person subject to legal incapacity; *Carr* v. *Ellison*, 2 B. C. Ca. 56; *Padbury* v. *Clark*, 2 M'N. & G. 298; *Ashby* v. *Palmer*, 1 Mer. 296. But although at common law a married woman could not have elected to reconvert, it was afterwards held, in consequence of the powers given by 3 and 4 Will. IV., cap. 74, §§ 40, 71, and 77, and 8 and 9 Vict., cap. 106, § 6, to married women to dispose, with the concurrence of the husband, of any estate or interest at law or equity, that land devised upon trust in terms amounting to a conversion might be disposed of by a married woman as an interest in land; *Briggs* v. *Chamberlain*, 11 Hare, 69, 23 L.J. Ch. 635; *Tuer* v. *Turner*, 20 Beav. 560, 24 L.J. Ch. 663. A legatee having only a contingent or defeasible interest cannot effectually discharge a trust for sale, so as to operate a reconversion of the estate; *Sisson* v. *Giles*, 32 L.J. Ch. 606.

4. In *Lingen* v. *Sowray*, 1 P. Wms. 172, it was held by Lord Harcourt that a remainder-man might elect to reconvert the trust-estate, so as that his election should be binding *inter hæredes*. But such election would of course be subject to the right of the owner of the prior estate to call for the actual conversion of the land or money in accordance with the instrument of trust—*Gillies* v. *Longlands*, 20 L.J. Ch. 441—which, in Mr. Lewin's opinion, would render the intended election ineffectual (Lewin on Trusts, 9th ed. 1088). According to Scottish principles, it is conceived that the efficacy of such an intentional reconversion by the party entitled to a reversionary interest would depend upon whether the interest was vested. If the prior estate were a mere liferent interest in land, it is thought that the fiar might elect to take the lands specifically on securing the liferenter's interest by a bond and disposition in security. But if the prior estate in question were a fee of the proceeds of land directed to be sold, with a substitution, it is pretty clear that the substitute could not interfere to prevent the sale, because the institute in the case supposed would have a clear interest to take the estate in money, and so defeat the substitution.

5. According to English decisions, where an estate is directed to be sold for the benefit of several persons, it is not in the power of any single beneficiary to prevent the sale,—*Holloway* v. *Radcliffe*, 23 Beav. 163; *Chalmer* v. *Bradley*, 1 J. & W. 59; but if money be directed to be laid out in lands, any one of the beneficiaries may elect to take his own share as money, for in so doing he does not come into conflict with the interests of his colegatees; *Seeley* v. *Jago*, 1 P. W. 389; *Walker* v. *Denne*, 2 Ves. jun. 182, per Lord Loughborough.

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verted estate—the mode in which it is capable of being affected by diligence, its transmissibility by will or assignation, and its liability to legal claims—some further observations are necessary.

Distinction between effect of conversion in regard (1) to legal claims, and (2) to transmission.

449. In principle, it is clear that the legal claims affecting a testamentary estate must be determined by its quality in the person of the testator; for if the rule were otherwise, the rights of the legal claimants might be defeated by a mere expression of the testator's intention that his estate should be taken in a different character from that which actually belonged to it. The mode of transmission of the beneficial interest in the converted estate after it has vested in the beneficiary would seem to depend mainly upon the character of the interest which he acquires in it.

Converted heritage remains subject to claims of heir, and to terce and courtesy.

450. I. LEGAL CLAIMS AFFECTING THE CONVERTED ESTATE.—Constructive conversion, which is the creature of intention, can have no effect whatsoever upon the legal claims of the truster's successors. For example, the insertion of a direction to sell in a disposition of heritable estate would not bar the right of reduction *ex capite lecti*. The subject has been already discussed in treating of the interest of the truster's heirs and executors in the converted succession.[1] The same principle necessarily regulates the incidence of terce, *jus relictæ*, and legitim. Terce, for example, is exigible out of all the lands in which the proprietor died infeft.[2] Consequently, no direction to convert those lands into money *after* the truster's death is of any avail to exclude the rights of the widow; and accordingly, in a case where a part of the lands of a deceased proprietor was sold for payment of his debts, it was found that the widow was entitled, as tercer, to a share of lands equal in yearly value to a third of the whole lands in which her husband died infeft, inclusive of what had been sold.[3] The case referred to may be contrasted with another,[4] where a proprietor having disponed his estate by an *ex facie* absolute conveyance *inter vivos*, in security of borrowed money, it was held that terce was only exigible out of the reversion, such reversion being the measure of the husband's title and interest at the time of his death.

Converted personalty remains subject to legitim and *jus relictæ*.

451. *Jus relictæ*, again, being an absolute right to the capital of one-third or one-half, as the case may be, of the husband's free personal estate, it is clear that any direction to invest such estate in the purchase of lands can only receive effect as a disposition of the residue after allowing for that claim.[5] The remark is equally applicable

[1] *Supra*, Section II.

[2] Ersk. 2, 9, 46; Bell's Pr. § 1598.

[3] *Arbuthnott* v. *Arbuthnott's Trs.*, 23 June 1805, Hume, 294. And see *Bell* v. *Halliday*, 8 Dec. 1825, 4 Sh. 286, N.E. 289.

[4] *Bartlet* v. *Buchanan*, 27 Nov. 1812, F.C. On the same principle, terce is diminished by all heritable securities and real burdens completed by infeftment in the husband's lifetime; *Campbell* v. *Campbell*, 1776, 5 Br. Sup. 627; *Stewart*, 1792, cited 1 Bell's Com. 7th ed. p. 727, note 3.

[5] See *Ramsay* v. *Cowan*, 11 July 1833, 11 Sh. 967.

to legitim. A truster, in contemplation of law, disposes only of the dead's part—his own share of the succession.[1] It was solemnly determined in the case of *Hog* v. *Hog*,[2] that the right to legitim could not be disappointed except by means of an actual beneficial conveyance *inter vivos;* and that if a disposition of moveables should be made in the form of a *de præsenti* conveyance, yet if it appeared that the assignment was upon trust to invest the proceeds in land after the truster's death, the fund would remain moveable, and would be subject to legitim.

Legitim, &c. not exigible out of proceeds of converted heritage.

452. Conversely, legitim and *jus relictæ* are not exigible out of the proceeds of land disponed to trustees upon trust for sale and division of the proceeds. This point was determined with reference to a trust for sale, under which a sale had been carried through in the truster's lifetime, but the purchaser had not obtained a conveyance.[3] We have already seen that in the case of a lapse the lands result to the heir-at-law notwithstanding the direction to sell,[4] a proposition which is obviously inconsistent with the notion of any claim on the part of personal representatives. But a moveable interest in landed estate, *e.g.*, the right of a partner to a share of lands[5] or heritable bonds[6] forming part of the company estate, is of course subject to the legal claims of the widow and children.

Secus as to moveable interests in land.

453. II. Transmission of the Converted Estate.—In one sense of the term every beneficial or equitable interest in a trust-estate may be described as a "personal" right;[7] but in this sense personal interests in land are heritable, and are not susceptible of transmission by testament. A conveyance of an interest in a trust of heritable estate must therefore at common law be in the dispositive form;[8] and it was laid down in a leading case that the heir's interest can only be taken up by service.[9] Such being the general

[1] *White* v. *Finlay*, 15 Nov. 1861, 24 D. 38; see observations, p. 49.

[2] *Hog* v. *Hog*, 14 May 1800, M. "Legitim," App. No. 2; 12 July 1804, 4 Pat. 581. On the point that an absolute conveyance *inter vivos* takes the property out of the legitim fund, see *Milroy* v. *Milroy*, 31 May 1803, Hume, 285; *Collie* v. *Pirie's Trs.*, 22 Jan. 1851, 13 D. 506.

[3] *Baillie's Trs.* v. *Crosse*, 2 June 1832, 10 Sh. 617.

[4] *Neilson* v. *Stewart*, 3 Feb. 1860, 22 D. 646; see Lord Colonsay's observations, p. 656.

[5] *Sime* v. *Balfour*, 1 Mar. 1804, M. "Heritable and Moveable," App. No. 3, affirmed 22 July 1811, as *Kirkpatrick* v. *Sime*, 5 Paton, 525; sequel, as *Minto* v. *Kirkpatrick*, 23 May 1833, 11 Sh. 632.

[6] *Corse*, 10 Dec. 1802, M. "Heritable and Moveable," App. No. 2.

[7] Because the beneficiary is not the feudal proprietor, and cannot, for example, maintain an action of maills and duties, or other real action; *Drummond* v. *Mackenzie* (Redcastle), 1758, M. 16,206.

[8] See *Crawford* v. *Earl of Dundonald*, 22 May 1838, 16 Sh. 1017. Lord Cuninghame indicated an opinion that the right to call on a trustee to convey a heritable subject was itself heritable in a question as to the form of transmission, 16 Sh. 1019; *Wilson* v. *Smart*, 31 May 1809, F.C.

[9] *Buchanan* v. *Angus*, 15 May 1862, 4 Macq. 374.

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rule, it remains to be seen how far the requisites of effectual transmission of a beneficiary interest are affected by the character impressed upon it in virtue of a direction to convert.

Beneficial interest in proceeds of land directed to be sold is transmissible by assignation or arrestment.

454. It may safely be asserted that beneficiary interests in the proceeds of land, held by trustees subject to a direction to sell, are transmissible by assignation or testament, and liable to be attached by arrestment. This has been assumed in several of the succession cases in which the import of such directions was under consideration. For example, in *Speirs* v. *Speirs*,[1] Lord Cuninghame said, "When a trust has been executed for payment of creditors, and thereafter for division of the surplus, when realised, among a multiplicity of legatees, the interest of the latter, whether realised or not, is held as moveable, because the trust is viewed as granted solely for the purpose of liquidation and division, and the beneficiaries have only a *jus crediti* or personal claim against the trustees, *which is arrestable*." It is true that in *Pearson* v. *Ogilvie*,[2] Lord Curriehill, adverting to the possibility of completing a title by confirmation to the proceeds of heritable property directed to be sold, indicated an opinion that converted estate could not be dealt with as moveable succession in a question as to transmission. However, in the previous case of *Ramsay* v. *Lady White*,[3] it was ruled by a unanimous judgment of the Second Division, that an interest in heritable and moveable property, held by trustees under a trust for sale, was carried by the will of a beneficiary; and though some doubt was expressed as to whether a share in a house forming part of the trust-estate passed under the will, the difficulty seems to have had reference rather to the terms of the destination than to the question of subsequent transmission.

Beneficial interest in converted heritage is transmissible by testament.

455. It may easily be shown by general reasoning that such interests are transmissible by testament; for, if not, they fall, as we have already seen, to the beneficiary's next of kin; and to hold that the next of kin are preferable to the testamentary executors is an error too palpable to call for refutation. The mode of transmission of such interests must be similar, whether the purpose be testamentary or that of a disposition *inter vivos*, whence we conclude that moveable rights of succession to heritable property are transmissible by simple assignation in the same manner as rights of partnership, which are well known to be assignable without the use of dispositive words, although comprehending interests in heritable property.[4]

[1] *Speirs* v. *Speirs*, 21 Nov. 1850, 13 D. 81; see p. 87. See Bell's Com. 853, 5th ed. 1, 37. The point was decided in *Gray's Trs.* v. *Robertson*, 19 June 1863, 1 M. 936.

[2] *Pearson* v. *Ogilvie*, 25 Nov. 1857, 20 D. 105, see 110.

[3] *Ramsay* v. *Lady White*, 26 June 1833, 11 Sh. 786.

[4] See 2 Bell's Com. 7th ed. p. 3;

Beneficial interests in money rendered heritable by destination; how transmitted.

456. As regards beneficiary interests in money rendered heritable *destinatione*, it is doubtful whether they would be carried by a testament. The case of *Ross* v. *Ross*,[1] where the question was decided in the negative with reference to bonds secluding executors, is not conclusive, because the opinions of the judges proceeded partly on the ground that money bonds were in their own nature heritable, except in so far as affected by the Statute 1661, cap. 32, and the exclusion of executors was, in their opinion, an exclusion of the Statute. The question, however, is virtually decided by the case of *Crawford* v. *The Earl of Dundonald*.[2] The truster had granted an assignation of the right to a bill debt with a view to the trustee leading an adjudication in her favour, and subject to an obligation to denude in favour of the truster, her sister, or assignee. On the death of the truster's sister, an action was brought by her heirs, under certain testamentary instruments, to have it found and declared that the trust had expired, and that the right to the debt was in them. The Court held that the debt, having been rendered heritable in the person of the truster's sister by the decree of adjudication, could not be transmitted by testament. This decision, it is thought, must rule the case of money rendered heritable by a direction to invest it in the purchase of lands.

Minto v. *Kirkpatrick*, 23 May 1833, 11 Sh. 632 ; *Irvine* v. *Irvine*, 15 July 1851, 13 D. 1367.

[1] *Ross* v. *Ross*, 11 July 1809, F.C. ; and see cases in Br. Syn. 2329.

[2] *Crawford* v. *Earl of Dundonald*, 22 May 1838, 16 Sh. 1017.

CHAPTER XII.

OF ELECTION BETWEEN LEGAL AND CONVENTIONAL PROVISIONS.

1. Election, to whom competent, and how barred.
2. Subject of the Election.
3. Equitable Compensation.

Definition of the principle of election, or approbate and reprobate.

457. It is a rule of general jurisprudence that no person can accept a gratuitous provision which is given as an equivalent for a debt or legal provision, and at the same time claim the provision for which the equivalent is given. The principle that the legatee or beneficiary has the option of accepting the gift or rejecting it and claiming his legal rights—the principle of Approbate and Reprobate, as it was termed by the Scottish jurists—is the subject of this chapter, in which it is denoted by its modern name, Election.[1]

Intention to put grantee to his election may be either declared or implied.

458. The intention to substitute a gratuitous provision for a debt or legal provision may be declared either in express words or by implication. In the former case, if the debt is described in language sufficient to identify it, or if the legal claim is described by its appropriate name, or by words which in the language of municipal law comprehend it, no question can arise as to the applicability of the doctrine of election.[2] If, on the other hand, the intention to give a conventional provision as an equivalent for a legal provision is implied—that is, if it is the result of a legal presumption—the law of the testator's domicile, under which the legal provision would accrue to the beneficiary, must determine whether the terms of the settlement, the relationship of the parties, and the circumstances under which the conventional provision has been granted, are such as to raise the presumption that the conventional provision was given as an equivalent.[3] Where two

International questions in relation to election.

[1] It is scarcely necessary to say that an heir is not put to election merely by reason of his being a legatee of the ancestor to whom he succeeds, if it does not appear that the legacy is given to him on condition of his renouncing the succession. On this point, see Lord Eldon's remarks in *Crauford* v. *Coutts*, 5 Pat. 86; also *Wilson* v. *Henderson*, 29 March 1802, 4 Pat. 316.

[2] See *Trotter* v. *Trotter*, 10 June 1829, 3 W. & S. 407; *Dundas* v. *Dundas*, 22 Dec. 1830, 4 W. & S. 460, affirming 7 Sh. 241; *Bennet* v. *Bennet's Trs.*, 1 July 1829, 7 Sh. 817; *Prentise* v. *Malcolm*, 1749, M. 6591; and in the law of England, *Brodie* v. *Barry*, per Sir W. Grant, 2 Ves. & B. 127; *Welby* v. *Welby*, 2 Ves. & B. 187.

[3] See Chapter II., Section V., where an outline is given of the principles upon which the English and Scottish Courts

testamentary instruments deal with different estates, and each of them admits of being carried into effect independently of the other, a person taking under one of such instruments would not necessarily be bound to give effect to the other.[1] The plea of approbate and reprobate assumes, as explained by the late Lord President in *Douglas* v. *Douglas*,[2] "the power of making an election, and a consequent obligation to make an election," and his Lordship adds that "to make a proper case of election, the facts of the case must be such as to satisfy three conditions. In the first place, the person making the election must have a free choice. In the second place, the necessity of making the election must arise from the will, express or implied, of some one who has power to bind the person put to his election; and, in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied."

Questions relate to—(1) the elector; (2) subject of election; (3) disposal of the rejected provision.

459. The points to be illustrated relate to—*first*, the persons by whom election may be made; *secondly*, the property which may be the subject of election; and *thirdly*, the consideration of the question, what becomes of the rejected provision—that is, of the share of succession which might have been claimed *ex lege*, supposing the legatee to adopt the settlement, or of the legacy, if he reject the settlement.

SECTION I.

Election, to whom competent, and how barred.

Election must be spontaneous.

Capacity of the party.

460. The election must be the spontaneous and deliberate act of the party who is in right of the bequest.[3] An election made in ignorance of the party's legal rights,[4] or in circumstances not admitting of deliberation,[5] may be recalled. Homologation of a settlement will not easily be implied from facts and circumstances in the face of an express repudiation, executed within a reasonable time after the settlement came into operation.[6] An election made

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resort to the law of the domicile, in order to ascertain whether a beneficiary is put to his election with reference to the acceptance of testamentary provisions.

[1] *Dow* v. *Beith*, 11 March 1856, 18 D. 820.

[2] *Douglas' Trs.* v. *Douglas*, 1862, 24 D. at p. 1207.

[3] *Brodie* v. *Brodie*, 6 July 1827, 5 Sh. 900, N.E. 835; *Telford* v. *Jamieson*, 12 May 1835, 13 Sh. 735; *Rose* v. *Rose*, 20 Nov. 1821, 1 Sh. 154, N.E. 148.

[4] *Johnston* v. *Paterson*, 29 Nov. 1825, 4 Sh. 234, N.E. 237; *Hope* v. *Dickson*, 17 Dec. 1833, 12 Sh. 222.

[5] *Selkirk* v. *Law*, 2 March 1854, 16 D. 715, and see *Lowson* v. *Young*, 15 July 1854, 16 D. 1098.

[6] *Panmure* v. *Crokat*, 22 Nov. 1854, 17 D. 85; *Hutchison* v. *Hutchison*, 7 Feb. 1822, 1 Sh. 295, N.E. 271; *Hog* v. *Lashley*, 7 May 1792, 3 Pat. 247.

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Curators of insane persons.

by a minor is null, or at all events reducible, on the ground of minority and lesion.[1] The *curator bonis* of a lunatic is not bound to elect on behalf of his ward whether he shall take his legal or testamentary provisions;[2] but if an arrangement is made between all the beneficiaries under a settlement, with a view to the distribution of the estate, it may be the duty of a *curator bonis* to enter into it, if terms are offered favourable to the interests of his ward; and if he does so, the transaction will be binding, though it will not be allowed to affect the character of the lunatic's succession as heritable or moveable.[3] A father has no power to deprive his insane child of legitim, or to limit the interest of the child by his settlement to a fixed provision.[4]

Wife may elect to take conventional provisions settled on herself in lieu of legal provisions.

461. It was stated in the last edition, on what appeared to the author to be good authority, that a husband was not entitled, in virtue of the *jus mariti*, to exercise the right of election for his wife.[5] In the case of *Stevenson* v. *Hamilton* a wife had ratified her father's testamentary settlement, whereby the *jus mariti* of her husband was excluded, but which contained provisions highly favourable to her interests and those of her children. The husband, who had not given his consent to the wife's ratification of the settlement, concurred with his creditors putting forward a claim of legitim in her name. The case was sent to the whole Court, and the Court, in conformity with the opinion of a majority of the judges, sustained the wife's election.

Whether husband's creditors can object to a capricious exercise of the right of election.

462. In *Lowson* v. *Young* the circumstances were similar, except that the wife began by intimating to her husband's trustees her intention to claim legitim; and afterwards, with her husband's consent, resolved to take under her father's settlement, which gave her, in place of legitim, provisions of greater pecuniary value. The wife's election was challenged by the husband's creditors, and the case was decided in favour of the wife, on the ground that she had made a fair election, and that there was no cause of complaint on the part of the creditors, but with this observation, that a wife would not be allowed capriciously, or where the disproportion was great, to renounce a greater benefit, which would go to her husband's creditors, and to choose a lesser benefit because their rights were excluded by the will.[6] Now, *Stevenson* v. *Hamilton* is

[1] Cases in note 3, p. 247, *supra*.

[2] *Cowan* v. *Turnbull's Trs.*, 7 D. 872, 17 March 1848, 6 Bell, 222. As to the competency of a tutor or curator for a minor exercising the power of election, see *Paterson* v. *Moncrieff*, 15 May 1866, 4 Macph. 706.

[3] *Kennedy* v. *Kennedy*, 15 Nov. 1843, 6 D. 40; see Pet. *Hope*, 15 Jan. 1858, 20 D. 391.

[4] *Morton* v. *Young*, 11 Feb. 1813, F.C.

[5] *Lowson* v. *Young*, 15 July 1854, 16 D. 1098; *Stevenson* v. *Hamilton*, 7 Dec. 1838, 1 D. 181. See Lord Benholme's remarks on this case, in 20 D. 660.

[6] See observations of Lords Colonsay and Rutherfurd, 16 D. 1103.

a decision of very high authority, and its authority was recognised and deferred to by the Second Division of the Court so recently as 1876, when Lord Neaves said, "We have the authority of *Stevenson* v. *Hamilton* for the proposition that the right to legitim, where there is in the repudiated deed a provision excluding the husband's *jus mariti*, does not vest in the husband *ipso jure*. . . . At all events, the opinion of the Court must be taken about it."[1] And Lord Gifford, "Where a wife's father has made large provisions for his daughter, but excluded the husband's *jus mariti*, the husband has no absolute right to renounce or to compel his wife to renounce these large provisions, in order that he may claim and pocket for himself or for his creditors a much smaller amount of legitim."[2] The Lord Justice-Clerk concurred, and Lord Ormidale doubted. The same Court, ten years later, without taking time to consider the authorities, and on the preamble that "there is hardly room for argument here," reversed the Lord Ordinary's judgment, sustaining a written election by two married ladies, and held that the minute in question could not be supported, because the husbands were not parties to it.[3] Now, in this case the testator had divided his whole estate between his married daughters with the usual trusts, giving a life interest to them and the fee to their children, subject to a small alimentary annuity to an unmarried daughter; and it is hard to see why, in such a case, a Court of law and equity should think itself entitled to cancel an election which was manifestly a sound election in the interest of the ladies themselves and their families, merely, as Lord Gifford put it, to enable the husbands to pocket a smaller sum. In such cases the conflict of interests is always between the wife and children and an impecunious husband and father, and, if the husband's consent is necessary, he virtually determines the election for his wife. Notwithstanding the decision in *Miller* v. *Galbraith* (which was probably a somewhat special case), the writer must still consider *Stevenson* v. *Hamilton* the ruling authority, and it leads to this, that where a wife has made a fair election in the interest of her family and herself, the Court will not allow this to be reopened under pressure from creditors.

Election made in error may be rescinded.

463. An election between legal and testamentary provisions is a quasi-contract between the electing party and the executors or representatives of the deceased, and, like any other contract, it may be resiled from while incomplete, or rescinded on the ground of mutual error, or error induced by the conduct and representations of those who benefit by it. In practice, and for reasons which are

[1] *Miller* v. *Birrell*, 4 R. 87, at p. 97.
[2] 4 R. 95.
[3] *Miller* v. *Galbraith's Trs.*, 1886, 13 R. 764.

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evident, the Courts have been less indulgent to claims at the instance of representatives seeking to resile from an election made by the party to whom the right originally accrued, than they are towards claims of the same nature when preferred by those parties.

464. The distinction is very clearly brought out in three cases, which within the last few years came before the House of Lords. In the case of the *Dowager Countess of Kintore* v. *The Earl*, legitim was claimed by the heir on the ground that the provisions of a marriage-contract excluding legitim did not apply to him. On the plea of bar, the late Lord President observed, "I do not think that it is sufficient to exclude a claim of this kind, even although the misunderstanding and ignorance on both sides may have led to the defender (Lady Kintore) being more liberal in some of her arrangements than she otherwise would have been. If the fault of ignorance lay upon one side only, the case might be different, but I think both parties here are equally to blame. It was ignorance of law, or at least of legal right, upon both sides; but it cannot be said that that ignorance was induced on the one side by the representations or conduct of the other."[1] These views were upheld by the House of Lords on appeal. In *Inglis' Trustees* v. *Inglis*,[2] the truster's daughter, through her agent, had made a formal intimation to her father's trustees that she claimed her legitim; but it appeared that the claim was made on the supposition that she would be entitled to the entire legitim fund. On a claim being made by the lady's brother to a share of the legitim, the effect of which, if sustained, would be to cut down her share to one-half of its supposed value, she was allowed to withdraw her election; and in the House of Lords the case was considered so clear that the appellant's counsel did not press the case to a decision.[3] These decisions contrast strongly with those given upon claims by representatives, of which the most notable is *Edward* v. *Cheyne*,[4] where a will, under which the testator's wife had a general liferent, contained this direction,—"After the death of the survivor of me and my wife, and with her consent and full approval (in token of which she has subscribed this deed)," to pay certain legacies,—and the residue was appropriated to charitable purposes, and the representatives of the wife (who only survived her husband

Distinction as to claim to rescind, when made by representatives.

[1] *Kintore* v. *E. of Kintore*, 11 R. 1013, see p. 1029; affd. 1886, 13 R. (H.L.) 93. Similarly, *E. of Glasgow's Tr.* v. *E. of Glasgow*, 1872, 11 M. 219, a case of election between marriage-contract and testamentary provisions.

[2] *Inglis' Trs.* v. *Inglis*, 1887, 14 R. 740.

[3] 17 R. (H.L.) 76. There are two recent cases in which wives were held entitled to resile from an election, and to claim *jus relictæ*; *Macfadyen* v. *Macfadyen's Trs.*, 1882, 10 R. 285; *Donaldson* v. *Tainsh's Trs.*, 1886, 13 R. 967.

[4] *Edward* v. *Cheyne*, 11 R. 996; affd. 1888, 15 R. (H.L.) 37. But see *Crellin* v. *Muirhead's Factor*, 1892, 20 R. 52.

a few weeks) made a claim in her right to terce and *jus relictæ*, maintaining that her signature to the will only covered the legacies, it was held that her subscription of the will imported an acceptance of the life-interest under the instrument, as in place of terce and *jus relictæ*, which was not revocable by her executors. Lord Rutherfurd Clark said, at the end of his opinion—"Whether she (the wife) could have withdrawn her consent and claimed her legal provisions it is not necessary to inquire. Such a right was personal to herself, and did not transmit to her next of kin."[1] There is nothing contrary to this suggestion in the opinions delivered in the House of Lords affirming the judgment of the Court of Session. There is one case, indeed, in which representatives may claim legitim or *jus relictæ* within any time short of the long prescription, and that is the case where the person represented has neither drawn the legal provision nor an equivalent; and this was the ground of the decision in the case of *Mackenzie* of Dundonell.[2]

Rights of children not prejudiced by parent's election to take their legal provisions.

465. A parent is not entitled to elect on behalf of his children; and where a settlement provides a liferent interest to the testator's son and the fee to his grandchildren, the repudiation of the liferent provision by the son does not affect the grandchildren's right to the fee. This was the point decided in the case of *Fisher* v. *Dixon*[3] as to legitim, where the House of Lords found that, although the testator's son had claimed and received payment of his legitim, the grandchildren were entitled to payment of the capital or reversion of the sum which had been left to them subject to their father's liferent. In a subsequent case,[4] where a father settled the income of a sum of money upon his daughter, and bequeathed the principal sum to her family in the event of her marriage, whom failing, to her sisters and brothers, adding, "it is understood that I include her mother's share in the above sum,"—the daughter repudiated the settlement and claimed legitim, as well as her share of her mother's interest in the goods in communion; it was held that the daughter's children were entitled to the principal sum bequeathed to them, under deduction of the sum that would have fallen to their mother as one of her mother's next of kin.

SECTION II.

Subject of the Election.

Deed ineffectual to convey heritage does

466. As to the subject of election, it will include, as a general rule, all property of which the testator has declared his intention

[1] 11 R. 1004. See observations in *Pringle's Exrs.*, 1870, 8 M. 622, 625.

[2] *Mackenzie* v. *Mackenzie's Trs.*, 1873, 11 M. 681.

[3] *Fisher* v. *Dixon*, 1 July 1833, 6 W. & S. 431, affirming 10 Sh. 55; *Collier* v. *Collier*, 6 July 1833, 11 Sh. 912; *Ewen* v. *Watt*, 10 July 1828, 6 Sh. 1125.

[4] *Sinclair's Exrs.* v. *Rorison*, 11 Dec. 1852, 15 D. 212.

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of disposing, whether actually within his power or not; and may include, for example, the interest in an entailed estate.[1] But if the deed is in form inhabile to convey land, it will not necessarily be inferred that the testator intended to subject his landed estate to the dispositions of the deed, although heritable property is mentioned in it. This principle was applied to a testamentary conveyance of heritable and moveable estate executed by a party domiciled in Scotland, which under the law in force prior to 1868 did not affect the lands.[2]

not put the heir to his election unless intention manifested.

Court may compel an heir of foreign real estate to make it available for the purposes of the will.

467. Where a testator dies domiciled in England, his will conveying Scottish heritage, if framed in language adapted to convey real estate according to the law of England, is held to put the heir to his election either to relinquish his right as heir of the Scottish estate, or to repudiate the settlement.[3] So also, where a Scottish testator executes a settlement in Scotland ineffectual to convey English or foreign property, but indicating an intention to convey it, the heir to the property is precluded by the law of approbate and reprobate from claiming the English real property as heir-at-law, and also the testamentary provisions in his favour.[4]

468. If a testator, erroneously supposing himself to have a power of appointment over the property of another, disposes of it by will, his legatees who repudiate the appointment are not thereby put to their election with respect to the testamentary provisions in their favour.[5]

Election where different subjects are conveyed by different writings forming part of one entire settlement.

469. Where the expression of the testator's will is contained in several distinct writings, the whole must be read as one settlement; and the heir cannot repudiate one of them, or reduce it on the head of deathbed, without forfeiting the provisions in his favour contained in the other;[6] and the principle is the same in the case where a testator begins by conveying his heritable estate directly to an heir or heirs, and leaves his moveable estate only to be administered by trustees or executors.[7] An heir cannot claim a

[1] *Carmichael* v. *Carmichael*, 15 Nov. 1810, F.C.; *Smith* v. *Murray*, 9 Dec. 1814, F.C.

[2] See *Campbell* v. *Munro*, 23 Dec. 1836, 15 Sh. 310.

[3] *Martin* v. *Martin and Stone*, 17 June 1795, 3 Pat. 421; *Murray* v. *Baillie*, 24 Feb. 1849, 11 D. 710; *Campbell* v. *Munro*, 23 Dec. 1836, 15 Sh. 310; *Lamb* v. *Montgomerie*, 20 July 1858, 20 D. 1323; *Campbell's Trs.* v. *Campbell*, 15 July 1862, 24 D. 1321. The question whether he is put to his election is in this case determined by the law of England, the law of the will; *Robertson* v. *Robertson*, 16 Feb. 1816, F.C.; *Trotter* v. *Trotter*, 10 June 1829, 3 W. & S. 407.

[4] *Dundas* v. *Dundas*, 22 Dec. 1830, 4 W. & S. 460; *Alexander* v. *Bennet's Trs.*, 1 July 1829, 7 Sh. 817.

[5] *Douglas* v. *Douglas*, 1862, 24 D. 1191.

[6] *Black* v. *Watson*, 9 Feb. 1841, 3 D. 522; *Stewart, &c.* v. *Stephen, &c.*, 29 Nov. 1832, 11 Sh. 139; *Harvey's Trs.* v. *Harvey's Trs.*, 28 June 1860, 22 D. 1310; 30 Jan. 1862, 1 Macph. 345.

[7] *Davidson's Trs.* v. *Davidson*, 1871, 9 M. 995.

legacy of moveable estate given to him by a deed which he challenges as ineffectual to convey heritage because it was executed on deathbed;[1] but he may found upon the deed which he challenges to the extent of taking advantage of a clause of revocation contained in it, if he has an interest.[2] Of course, if the settlement does not dispose, or profess to dispose, of the whole succession, the beneficiaries are entitled, in their character as heirs-at-law, to claim what is undisposed of; for there is no inconsistency in claiming what the testator does not, as well as what he does, dispose of.[3] Where two settlements were distinct in their scope, so that the Court could not infer that they were intended to stand or fall together—the one being a testament, and the other a deed of entail—it was held that the acceptance of a bequest under the testament did not bar the heir from challenging the deed of entail as being *ultra vires* of the granter.[4] So in the case of a daughter whose father was a party to her marriage-contract, she, by taking benefit under that deed, is not barred from asserting her claim to legitim on her father's death.[5] This principle was followed in the case of *M'Donald* of Dalchosnie, where it was held that the acceptance of a sum of £25,000 under a deed of appointment did not raise an election between that deed and a relative deed of entail, in which this sum was treated as applicable to the extinction of debt secured over the entailed estate.[6]

Beneficiary adopting the settlement cannot claim legal succession as representative of a co-beneficiary.

470. A beneficiary who accepts a testamentary provision, being barred from making any claim inconsistent with the expressed will of the testator, is precluded from taking an interest in his succession in the capacity of the representative of a deceased person claiming adversely to the will. On this principle it was held, with reference to a settlement in favour of the granter's children, and the survivors, the vesting being postponed until the majority of the children, that the surviving children who had adopted the settlement were not entitled to claim legitim as representatives of

[1] *Kerr* v. *D. of Roxburgh's Trs.*, 23 Nov. 1815, Hume, 25, affirmed 1 Bligh, 1. Whether the heir can found on a settlement which he has partially reduced to the effect of claiming the benefit of a clause relieving the heritable estate of burdens affecting it, see *Crawford's Trs.* v. *Crawford*, 11 Jan. 1867, 5 Macph. 275.

[2] *Battley* v. *Small*, 2 Feb. 1815, F.C.; *Kerr* v. *D. of Roxburgh's Trs.*, *supra*. As to the exclusion of the heir's interest, see Chapter IX., Section IV.

[3] *Wightman* v. *De Lisle*, 16 June 1802, M. 4479; see *Robertson* v. *Ogilvie's Trs*, 20 Dec. 1844, 7 D. 236; *Maitland* v. *Maitland*, 14 Dec. 1843, 6 D. 244; *Wilson* v. *Dick*, 30 June 1840, 2 D. 1236.

[4] *Urquhart* v. *Urquhart*, 20 Feb. 1851, 13 D. 742. And see *Dow* v. *Beith*, *supra*, § 458.

[5] *Somerville's Trs.* v. *Dickson's Trs.*, 1887, 14 R. 770; *Rait* v. *Arbuthnott*, 1892, 19 R. 687.

[6] *M'Donald* v. *M'Donald*, 1876, 4 R. 45. And see as to interests under mutual settlments, *Lang's Trs.* v. *Lang*, 1835, 12 R. 1265.

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children who had died in minority without approving the settlement and had thus acquired a vested interest in the legitim fund.[1]

To what extent a testator may affect his legatee's private estate.

471. By the operation of the principle of election, a testator may not only debar his legatees from claims affecting his own estate, but may burden a legatee with the payment of provisions to other parties, or may dispose indirectly of what belongs to another, or attach such conditions to a bequest as are lawful and possible. The case of *Bonhote* v. *Mitchell's Trustees* exemplifies the principle of the *res aliena legata* in a new form. A father's will contained a declaration that the bequests there provided to the children were to be in satisfaction of legal claims, and also of claims arising under his contract of marriage. Now, the father, in dealing with a fund settled by this marriage-contract subject to apportionment, had attached conditions to the apportionment which were *ultra vires*. It was held that a daughter who took benefit under the will was not entitled to challenge the exercise of the power as being *ultra vires*.[2] An exception has, however, been admitted, where the fulfilment of a condition involves the sacrifice of the legatee's right to a different subject or estate without conferring any benefit on other legatees. In such a case the condition ought not to be enforced, because the testator is supposed to have imposed it for the benefit of legatees, and the condition must be confined to the case to which it was intended to be applied. On this principle, where an heir of entail had erroneously made up his title to an entailed estate as fee-simple proprietor, and afterwards executed a new entail, comprehending the entailed estate and certain fee-simple property, it was held that the next heir, by acceptance of a new grant, did not become bound to hold the entailed estate subject to the conditions of the new entail; because in so doing he would have incurred an irritancy, which could not have been within the contemplation of his ancestor.[3] Allied to this exception is the case of a bequest or disposition of heritage for purposes which the law will not allow to be executed, and where the heir may accept a pecuniary legacy and may also claim the estate as heir, because the law will not allow him to surrender the estate to the uses of the will. It was so held with reference to a case where the will, in so far as disposing of real estate in England was found to be void under the statute of Mortmain.[4] The ground of judgment is indicated in the following sentences:—

Case of estate affected by law of Mortmain.

[1] *Stewart's Trs.* v. *Stewart*, 20 Dec. 1851, 14 D. 298.

[2] *Bonhote* v. *Mitchell's Trs.*, 1885, 12 R. 984.

[3] *Arbuthnott* v. *Arbuthnott*, 1792, Bell's Oct Ca. 161, M. 620; *Urquhart* v. *Urquhart, supra*; *Douglas' Trs.* v. *Douglas*, 20 June 1862, 24 D. 1191; see the Lord President's observations, p. 1207.

[4] *Hewit's Trs.* v. *Lawson*, 1891, 18 R. 793.

"A case of election will generally arise where a testator is professing to dispose of property over which he has only an imperfect power of disposition, which can be made perfect by the assent of the legatee to the testamentary instrument. The case of a father disposing of the legitim fund and the case of a proprietor disposing of his heritable estate on deathbed are illustrations. . . . In order to put a legatee to his election, it must be in his power, by waiving the objection to the will or adverse claim, to perfect the right of the testamentary disponees. There is certainly no case in which a legatee who had not the power of perfecting the right of the disponees has been called on to give an equivalent benefit. Such an objection could only arise under a provision of the will itself, as in the case of *res aliena scienter legata*, where the testator is held to have impliedly directed the purchase of the thing by his heir."[1]

SECTION III.

Principle of Equitable Compensation.

Appropriation (1) of rejected legal succession; (2) of rejected conventional provisions.

472. The question as to the disposal of the unclaimed estate, where an heir or legatee is put to his election between legal and conventional provisions, is one of very extensive application; but it will be found, on an examination of the authorities, that all such questions are in general resolved by the application of what is termed the principle of Equitable Compensation, under which the unclaimed provision accrues to the person or class of persons whose interests are diminished by reason of the mode in which the right of election has been exercised. We shall examine, in the first place, the position of the estate considered as subjected to legal claims, in the case of the beneficiary approbating the settlement; and thereafter, the position of the same estate viewed as the subject of testamentary disposition, in the alternative case of the beneficiary rejecting or reprobating the settlement.

Rejected shares of heritable and moveable succession fall into residue.

473. (1.) With regard to the legal claims of the heirs-at-law and executors of the testator, no difficulty is likely to arise. As to heirs-at-law, it seems clear, though the point has never been decided, that if an heir-portioner accepts a testamentary or dispositive provision in lieu of the inheritance, the share of heritage liberated by the election of such heir to take under the settlement will fall into the general residue, to be applied for the purposes of the settlement. This is evident, indeed, from the consideration that the co-heirs would have no title to reduce the settlement—for example, on the head of deathbed—except to the extent of

[1] 18 R. 803.

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their respective shares. The same result would follow in the case of moveable estate ineffectually disposed of under a foreign will.

Whether the benefit of unclaimed terce enures to the heir-at-law successfully challenging a settlement.

474. With respect to terce and courtesy, it is sufficient to say that the acceptance of a fixed provision in lieu of either of those liferent rights operates in the same manner as a discharge of the liferent, so that the entire estate becomes subject to the purposes of the disposition.[1] But supposing that the special provision were made payable out of a moveable fund, and that the heir-at-law had challenged the settlement as having been executed on death-bed, would the terce accresce to the fee-simple estate, or would the settlor's trustees be entitled to retain it as in compensation to the fund out of which the special provision was payable? The analogy of the cases on *jus relictæ* points to the application of the principle of compensation.[2]

Distinction between legitim discharged and legitim satisfied by acceptance of a testamentary provision.

475. As to the disposal of unclaimed shares of legitim, it is necessary to distinguish between the case of a discharge of legitim during the father's lifetime, whether by antenuptial contract or by acceptance of a provision *inter vivos*, and the case of the acceptance of a legacy in satisfaction of legitim. The effect of a discharge in the father's lifetime is the same as if the child had predeceased his father; the right lapses, and the benefit of it enures to the other children interested in the legitim fund.[3] "Up to the time of the father's death," said Lord Cottenham in *Fisher* v. *Dixon* (the second case reported under that name), "the right of the children to legitim, though spoken of as existing for some purpose, is at most future and subsequent, depending not only upon the amount, if any, of the property, but upon the number of children entitled to partake of it at the father's death. But upon that event happening, all contingency ceases, and the right becomes present and vested; so that if the child die before it receives its share, the representatives are entitled to it."[4]

Legitim vested, but not claimed, falls into residue in virtue of the principle of equitable compensation.

476. In the same case, it was decided by all the Law Lords on appeal, in conformity with the opinions of a majority of the judges of the Court of Session, that the acceptance after the father's death of a provision declared to be in satisfaction of the legitim, operated in favour of the general disponee, and not of the children who betook themselves to legitim.[5] In this case the question lay

[1] This rests on Statute with respect to terce (1681, cap. 10). See Chapter VII., Section IV.

[2] See *Campbell's Trs.* v. *Campbell*, *infra*, § 477.

[3] *Hog* v. *Lashley*, 7 May 1792, 3 Pat. 247, affirming M. 8193; *Lord Panmure* v. *Crokat*, 29 Feb. 1856, 18 D. 703; *Martin* v. *Agnew*, 1749, M. 8167; *M'Gill* v. *Oxenford*, 1671, M. 8179; *Fisher* v. *Dixon*, *infra*.

[4] *Fisher* v. *Dixon* (2d case), 2 Bell, 73.

[5] *Fisher* v. *Dixon*, 2 D. 1121, 3 D. 1181, 6 April 1843, 2 Bell, 63, confirming *Henderson* v. *Henderson*, 1782, M. 8191.

between the holders of the legitim fund and a general disponee, who was burdened with provisions in satisfaction of legitim. The principle of the decision would obviously apply to a similar question between claimants of legitim and the residuary legatee under a trust settlement. It is an obvious deduction from the principles established by *Hog* v. *Lashley* and *Fisher* v. *Dixon*, that a discharge of legitim by *all* the children operates in favour of the residuary legatee or next of kin alone, if made after the father's death; but if before, then in favour of the widow jointly with these parties, the division of the succession being in that case bipartite.

Application of these rules to *jus relictæ*.

477. It was formerly held (in *Andrews* v. *Sawer*) that the effect of the acceptance by a widow, after her husband's death, of a special provision in lieu of *jus relictæ*, was to subject the estate to a bipartite division, so that the benefit of the lapsed interest should accrue jointly to the legitim fund and to the dead's part.[1] But the observations of the Law Lords in *Fisher* v. *Dixon*,[2] to the effect that *Andrews* v. *Sawer* was inconsistent with the principle of *Henderson* v. *Henderson*, upon which they proceeded, have virtually overruled the case of *Andrews* v. *Sawer*; and it has now been formally decided that a discharge of *jus relictæ* after the death of the head of the family has no effect upon the amount of the legitim, but operates exclusively in favour of the residue or other fund charged with the special provision.[3]

Children may claim undisposed-of succession notwithstanding an exclusion of their rights by marriage-settlement, &c.

478. Though a father of a family, after providing for his wife and children, should declare that their portions shall be accepted by them in satisfaction of legitim, *jus relictæ*, and all other claims, yet if he die intestate as to the whole[4] or a part of his heritable or moveable succession, the children are of course entitled, as his representatives, to claim that part of the moveable estate of which he did not dispose; the eldest son being, on the same principle, entitled to claim all undisposed-of heritage.[5]

Unclaimed conventional provisions fall into residue.

479. (2.) The result of the authorities is, then, that the benefit of a forfeited *legal provision* enures to the fund burdened with the conventional provision, usually the residue, or if that be undisposed of, then to the testator's legal representatives. It will be seen that the result is precisely similar in the case of a *bequest* being forfeited in consequence of the legatee claiming his legal provisions. In this case also the residuary legatee is entitled to the resulting

[1] *Andrews* v. *Sawer*, 2 March 1836, 14 Sh. 589.

[2] *Fisher* v. *Dixon*, 2 Bell, 75-78.

[3] *Campbell's Trs.* v. *Campbell*, 15 July 1862, 24 D. 1321.

[4] *Wilson* v. *Gibson*, 30 June 1840, 2 D. 1236; *Maitland* v. *Maitland*, 14 Dec. 1843, 6 D. 244.

[5] *Blackwood* v. *Dykes*, 26 Feb. 1833, 11 Sh. 443; *Sinclair* v. *Traill*, 27 Feb. 1840, 2 D. 694; *Stoddart* v. *Thomson*, 1734, Elch. "Succession," No. 1.

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interest, on principles which are more fully explained in treating of bequests of residue.[1]

Leading decisions.

480. The leading case is that of the *Marquis of Breadalbane's Trustees* v. *Lady E. Pringle*,[2] a decision of great authority, from the eminence of the judges who took part in it. The testator directed that his trustees should annually pay over the free rents of his unentailed lands to his two daughters, Lady Elizabeth Campbell (afterwards Pringle), and Mary, Marchioness of Chandos, equally between them, while both should be in life, and to the survivor, and should continue to do the same as long as both or either of them should be alive. The second daughter claimed her legitim, contrary to the purpose and scope of the settlement; and the decision of the Court was, "that the interest of Lady Elizabeth Pringle in the rents of the unentailed estates is not enlarged by the forfeiture which the Duchess of Buckingham has incurred, but that such forfeiture operates during the lifetime of the Duchess of Buckingham in favour of the trustees of the late Marquis of Breadalbane.[3]

481. In *Annandale* v. *M'Niven*[4] the testator gave to his widow a liferent of the whole estate in satisfaction of her terce and *jus relictæ;* and he directed his trustees upon her death, and in the case of a failure of issue (which happened), to divide the residuary estate amongst certain collateral relatives. The widow claimed her legal provisions. The Court awarded the surrendered liferent interest to the residuary legatees, and decreed for an immediate division.[5]

Cases where children of the person electing have an independent right.

482. The questions which have arisen in the application of the principle of equitable compensation have relation chiefly to the interests of the children of the person by whom an election has to be made between a conventional provision and legitim or *jus relictæ*. In a case in which it was contended that the gift to the children was so involved in the provision to the parent that their interests must stand or fall together, the following observations were made:— "The true ground of decision in *Fisher* v. *Dixon*, as explained by the Lord President in *Jack's Trustees*,[6] is that in a family provision the children have a separate and independent interest, which is not

[1] Chapter XXXI., Section V.

[2] *Breadalbane Trs.* v. *Pringle*, 15 Jan. 1841, 3 D. 367; *M'Innes* v. *M'Allister*, 29 June 1827, 5 Sh. 862, N.E. 801; *Peat* v. *Peat*, 14 Feb. 1839, 1 D. 508.

[3] Interlocutor, 3 D. 366.

[4] *Annandale* v. *M'Niven*, 9 June 1847, 9 D. 1201.

[5] On the question whether the discharge of a temporary burden entitles the legatees to an immediate division, see Chapter XLVI. In the case cited the subsistence of the widow's liferent, supposing she had accepted, would not have prevented the fee from vesting.

[6] *Jack's Trs.* v. *Marshall*, 1879, 6 R. 543.

affected by the act of the parent derogating from the authority of the will. It is not necessary that the gift to the children should be independent in form; if it is substantially a separate and independent interest, the law will protect it, and will not involve the children in the consequences of the parent's election to claim legitim. . . . . Here the children do not take in substitution to their mother (which would raise a very different question), but they take as institutes subject to the life interest."[1] Where a testator gave the income of his estate to a son for his own maintenance, and the maintenance and education of his family, and the fee to that son's children, and the son claimed legitim, it was held that the right of the children in the fee was not affected, but that the interest of the children in the income which was to be administered by the father was inseparable from the father's interest, and that to this extent they were involved in the parent's forfeiture.[2]

Case of forfeiture extended to children.

483. Sometimes a testator, in order the better to defend his estate against filial claims, declares that a child who may make an inconsistent claim shall in doing so incur the forfeiture of his children's provisions under the deed as well as his own. Such a declaration ought neither to be treated as *in terrorem* only, nor to be ingeniously construed to the detriment of the grandchildren. Examples of the mode of construction of such clauses will be found in the cases cited below.[3]

Mode of determining the application of equitable compensation.

484. The withdrawal of the legitim from the mass of the testator's estate takes effect as at the testator's death on the moveable estate as a whole, and the various beneficiary interests which the testator has constituted and charged upon it. But the provision intended to be given in satisfaction of legitim is most usually a life interest or annuity, and of course the "compensation" to be made to the persons injured by the withdrawal of legitim cannot be immediate. With respect to the application of the compensation money, two points have been determined: (1) Each annual instalment of the unclaimed annuity or liferented income as it accrues is to be apportioned amongst the beneficiaries (whether liferenters or fiars), in the proportion of the losses which they have respectively sustained through the exercise of the right of election by the other party.[4] As to how these losses are to be estimated, see the opinion of the Lord Ordinary, concurred in by the Court.[5] (2) Where the child has made an improvident election, and a surplus results to the trust after complete compensation has been

[1] *Snody's Trs.* v. *Gibson*, 1883, 10 R. at p. 602.

[2] *Jack's Trs.* v. *Marshall*, 1879, 6 R. 513.

[3] *Gillies* v. *Gillies' Trs.*, 1881, 8 R. 505; *Campbell's Trs.* v. *Campbell*, 1889, 16 R. 1007.

[4] *Russell's Trs.* v. *Gardner*, 1886, 13 R. 989.

[5] 13 R. at pp. 991-2.

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made to those who suffered from the exercise of the right of election, then (*a*) if the will does not expressly *exclude* the legitim, and does not forfeit the interest of those claiming contrary to the will (which was the actual case), no exclusion of legal claims is to be implied beyond what is necessary to give effect to the will, and the surplus income, after compensation has been made, is to be restored to the claimant of legitim; but (*b*) in the case of an express exclusion of legitim, or declaration of forfeiture, the judges were divided in opinion as to whether the surplus income would fall into residue or into intestacy.[1] Such is the result of the opinions of the judges in the case of *Macfarlane's Trustees*, which was referred to the Whole Court, in which the principle of equitable compensation was for the first time clearly distinguished from that of forfeiture. The distinction is illustrated by the case of a testator leaving his widow an annuity out of the rents of his heritable estate in satisfaction of her claim of *jus relictæ*. The widow claims her *jus relictæ*, and it is paid by the executor out of the moveable estate. If the widow's right under the settlement is forfeited, the resulting benefit accrues entirely to the heir whose estate is thereby disburdened. But if the principle of equitable compensation is applied, the rents of the heritable estate will, during the survivance of the widow, be payable in compensation to the executor.[2]

Generality of the application of the doctrine of equitable compensation.

485. A legatee may be under the necessity of electing between a marriage-contract provision and a testamentary gift in satisfaction of it. Here also the general rule is applied; and in whichever way the right of election is exercised, the person whose interest is diminished by the election has a right to a compensatory payment out of the unclaimed provision.[3] This principle is exemplified in a case where an heir incurred the forfeiture of a bequest of a share of residue under a general settlement in consequence of having reduced this settlement as a disposition of heritage *ex capite lecti*. In this case it was found that the forfeited share accresced to the other residuary legatees, because their interest was diminished through the withdrawal of the heritable estate by the heir.[4]

[1] *Macfarlane's Trs.* v. *Oliver*, 1882, 9 R. 1138.

[2] 9 R. at pp. 1167, 1158. On the question how far the compensation money is affected by restrictions applicable to the original share of a legatee, see *Johnston* v. *Johnston*, 1875, 2 R. 986.

[3] *Harvey's Trs.* v. *Harvey's Trs.*, 30 Jan. 1862, 1 Macph. 345; and see *Dixon* v. *Fisher*, 1 July 1833, 6 W. & S. 431.

[4] *Nisbet's Trs.* v. *Nisbet*, 5 D. 1851, 14 D. 145.

PART III.

FORM AND CHARACTERISTICS OF TESTAMENTARY WRITINGS IN GENERAL.

CHAPTER XIII.

OF THE CAPACITY TO MAKE A WILL.

(Disabilities of Testators.)

Capacity to make a will not dependent on any special or peculiar rules.

486. The execution of a will or testamentary disposition being only a particular mode of conveyance or transference of estate, it follows that every person possessed of estate, in a character which entitles him to dispose of it by deed *inter vivos*, has the capacity of conveying it to a trustee or executor for distribution after his death. This rule excludes persons who are subject to legal incapacity, as well as those who, from natural causes, are incapable of exercising the power of disposition.

Wills and settlements by the Sovereign, how regulated.

487. It is stated by English authors that, at common law, the Sovereign can only dispose of his private estate by letters-patent.[1] By a Statute of Geo. III.[2] the Sovereign is enabled to bequeath his private personal estate by a testamentary writing under the sign-manual; and, by a recent Statute, the Queen is enabled to dispose of her estates in Scotland by deed *inter vivos* or *mortis causa*, and also to hold such estates of subject-superiors through the intervention of trustees.[3]

Capacity of married women to dispose of real and personal estate.

488. A testament or disposition *mortis causa* by a married woman of her moveable property is effectual at common law without the husband's consent.[4] And it would seem that her will carries her interest in the goods in communion in so far as her right to dispose of them is unaffected by the provisions of the Intestate Succession Act;[5] that is, it will regulate her succession if she survive her husband. With regard to the heritable estate of a married woman, it is to be observed that the consent of the husband is

[1] Lewin on Trusts, 9th ed. 20, citing *Fordyce* v. *Willis*, 3 Br. C. Ca. 577.

[2] 39 and 40 Geo. III., cap. 88.

[3] 25 and 26 Vict., cap. 37.

[4] Ersk. 1, 6, 28; see Pothier, Tr. de la Puissance de Mari, No. 42. *Sed quære*, if she can leave a legacy by *donatio mortis causa*? *vide Miller* v. *Milne's Trs.* 3 Feb. 1859, 21 D. 377.

[5] 18 Vict., cap. 23, § 6.

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required to its alienation by deed *inter vivos*.[1] Testamentary dispositions are in a different position. They take effect only after the termination of the curatorial power and right of administration of the husband; and, provided his courtesy is not interfered with, the husband does not seem to have any interest in his wife's settlement of her property. Erskine was of opinion that a married woman might dispose *mortis causa* of her heritable estate, and exclude her husband's courtesy without his consent,[2] and this law is not affected by the Married Women's Property Act, 1881.

Wife's power of disposal of her separate estate.

489. As regards property settled on a married lady excluding the *jus mariti*, her powers are the same as those of an unmarried woman; and she may grant deeds respecting it, to take effect either *inter vivos* or after her death.[3] In a case which arose under the powers of the Entail Amendment Act, the Court authorised a married lady to execute a disentail of her separate estate without requiring the concurrence of the husband to the petition, and also held that she was entitled to subscribe the instrument of disentail without her husband being a consenting party.[4] By the Conjugal Rights Act, 1861,[5] a wife "deserted" by her husband may obtain an order to protect property which she has acquired, or may acquire, by her own industry, or by succession or otherwise, after the desertion; and by section 4 of the same Act it is declared that such property shall belong to her as if unmarried. The Married Women's Property Act, 1881, section 1, sub-section (2), prescribes that the wife shall not, without the husband's consent, "dispose" of her moveable estate. Do these words apply to testamentary disposal?

Disabilities of minors.

490. In the case of a minor who has curators, the extent of the disability varies according to the nature of the settled property. A minor without curators may alienate his property, whether heritable or moveable, for onerous or rational causes; and if the consideration be inadequate, he may be restored against the transaction by a reduction within the *quadriennium utile*. If he have curators, his position is so far different that their consent is necessary to validate the transaction. A minor, with or without curators, may

[1] Ersk. 1, 6, 27; *Boyle* v. *Crawford*, 5 Mar. 1822, 1 Sh. 372, N.E. 350; *Dick* v. *Donald*, 12 Dec. 1826, 2 W. & S. 522. But she has been held entitled to execute a deed of disentail without his consent; Pet. *Brisbane*, 1 Mar. 1850, 12 D. 917.

[2] Ersk. 1, 6, 27. See Menzies, Conv., 3d ed. p. 39; 1 Fraser, 274; More's Notes, 18; *contra*, Bankton, vol. i. p. 124.

[3] *Gowan* v. *Pursell*, 17 May 1822, 1 Sh. 418, N.E. 390; *Keggie* v. *Christie*, 25 May 1815, F.C.; *Clark* v. *Gibson*, 24 Jan. 1826, 4 Sh. 388, N.E. 391; *Gordon* v. *Gordon*, 16 Nov. 1832, 11 Sh. 36.

[4] Pet. *Primrose*, 9 March 1850, 12 D. 917. See *Brown* v. *Bedwell*, 3 Dec. 1830, 9 Sh. 136; Pet. *Hamilton*, 1777, 5 Br. Sup. 625.

[5] 24 and 25 Vict., cap. 86, § 1. The word "deserted" is ambiguous. At common law, it would seem that the wife of a convict has the power of disposing of her acquisitions. See note, *infra*, § 502.

execute a testamentary trust for the disposal of his moveable property.[1] But he cannot, even with his curators' consent, make a settlement of his heritable estate; "for, in order to alter the legal succession of heritage, there must be a deliberate *animus* in the granter of the deed, which cannot be presumed in a minor."[2]

Minor may settle his estate by antenuptial contract.

491. Under the category of rational deeds which a minor may grant are included antenuptial contracts, which are indeed so far favoured that they are sustained, when reasonable, although granted without the consent of curators.[3] With reference to the plea that such deeds are not only reducible but null, the observation of Lord Ivory[4] is important: "None of our writers on law say anything as to this nullity who do not concur in the qualification of the doctrine that it is a nullity to be pleaded against injury; and where the deed is for the benefit of the minor the nullity cannot be pleaded. . . . I do not wish to impugn the general doctrine that deeds entered into by a minor without consent of his curators are null, but only to point out such modifications as the peculiar case of marriage calls for."[5]

Incapacity resulting from insanity.

492. Amongst objections to wills involving the question of personal disability, there is none more frequently urged, or with more fatal effect, than that of insanity, or facility, on the part of the testator.[6] Insanity, which imports not only a want of judg-

[1] Ersk. 1, 7, 33; Bankton, vol. i. p. 177; *Stevenson* v. *Allan*, 1680, M. 8949; *Campbell* v. *Reid*, 12 June 1840, 2 D. 1089, per Lord President Hope. The distinction taken by Erskine, between bequest by testament and bequests of moveables by disposition, does not seem to be well founded: see More's Notes, 47.

[2] Ersk. *ut supra*; *Cunynghame* v. *Whiteford*, 1797, M. 8966. A distinction taken in *Brand's* case in the Court of Session between proper heritable estate and subjects rendered heritable by destination or accession, was not supported in the House of Lords. See Earl Cairns' opinion, 3 R. (H.L.) 17.

[3] *Bruce* v. *Hamilton*, 23 Dec. 1854, 17 D. 265; *Davidson* v. *Hamilton*, 1632, M. 8988; *Young* v. *Robertson*, 1769, M. 8988.

[4] *Bruce* v. *Hamilton*, 17 D. 270-2.

[5] Reference is made to the case of *Cooper* v. *Cooper*, where a lady of Irish extraction, married to a Scotsman, successfully claimed *jus relictæ*, on the ground that the contract of marriage, whereby this right was excluded, was null in respect of her "infancy,"—1888, 15 R. (H.L.) 21.

[6] A criterion of insanity in the legal sense is still a desideratum. The observations of Lord Colonsay in *M'Kellar* v. *M'Kellar*, 6 Dec. 1861, 24 D. 144, indicate without solving the difficulties of the problem. In the English case of *Dew* v. *Clarke* (3 Add. 79, 5 Russ. 163), Sir John Nicholl and the Court of Delegates successively pronounced against the validity of a will disinheriting the testator's only child, merely because the testator, an eminent electrician, had conceived a strong and groundless aversion to her, which he had manifested by acts of harshness and severity. This comes very near to the principle of the *querela inofficiosi testamenti* of the Civil Law, as explained in Inst. lib. 2, tit. 18.

As to the validity of a will made during a lucid interval, it was remarked by Sir Wm. Wynn (in *Cartwright* v. *Cartwright*, 1 Phil. 100), that if "the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it." Reference is

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ment, but the absence of *will*—of the disposing mind—is necessarily a fatal objection. Facility is not in itself a ground for reducing a will;[1] and accordingly the issues in reductions of settlements on the ground of facility invariably put the question, Whether the defender, *taking advantage* of the testator's weakness and facility, procured the deed by fraud or circumvention?[2] Where there was great mental or moral weakness on the part of the testator, persuasion has been held to be tantamount to circumvention.[3] The amount of pressure which will constitute circumvention in any case is a question of fact, or more properly, perhaps, of opinion; and the Court will not readily interfere with the decision of a jury on the matter.[4] The arts that may be practised by a beneficiary to procure the testator's signature to a will are not easily discoverable. "But," said Lord Justice-Clerk Hope, "if the facts satisfy the jury that there was in such party a motive to mislead and induce him to enter into the transaction, either for his own benefit or for the benefit of some one whose interest he was promoting, and that only persuasion and untrue representations, acting on a mind facile or nervously anxious from disease on the subject, could have brought about the result, then it is for the jury to say whether they draw from the whole case the inference of circumvention."[5]

Uncertainty of the legal criteria of insanity. Physiological criterion.

493. In the present state of the law, it is hopeless to attempt a definition of the state and degree of mental alienation which renders the person so affected incapable of making a will. It was observed by the late Lord President in *Morrison* v. *Maclean's Trustees*,[6] that "the test of capacity to execute a settlement might very reasonably be stated with reference to the nature of the settlement itself, but could not possibly be stated without reference to

also made to the following cases:—*Towart* v. *Sellar*, 6 Pat. 301; *Currie* v. *Currie*, 5 Sh. 838, N.E. 777; *Fraser* v. *Fraser's Trs.*, 13 Sh. 703; *Laing* v. *Bruce*, 1 D. 59, and cases in next note.

[1] As to the distinction between insanity and mere facility as grounds of reduction, see *Watson* v. *Noble's Trs.*, 29 June 1827, 2 W. & S. 648, affirming 4 Sh. 200, N.E. 202; *Scott* v. *Wilson*, 15 July 1825, 3 Mur. 526; *Whyte* v. *Ballantyne*, 20 June 1823, 1 Sh. (Ap. Ca.) 472; *M'Kellar* v. *M'Kellar*, *supra*; *Morrison* v. *Maclean's Trs.*, 27 Feb. 1862, 24 D. 625.

[2] See cases of *Watson* and *Scott*, *supra*; *Baird* v. *Harvey's Trs.*, 20 D. 1220; *Innes* v. *Tarbet*, 1740, M. 15,942; *Home* v. *Hardy*, 31 Mar. 1842, 4 D. 1184; *M'Diarmid* v. *M'Diarmid*, 28 Mar. 1828, 3 W. & S. 37, affirming 4 Sh. 583, N.E. 591; *Syme* v. *Henderson*, 15 July 1835, 13 Sh. 1132.

[3] *Clunie* v. *Stirling*, *infra*, 14 Nov. 1854, 17 D. 15; *Watson* v. *Noble's Trs.*, *supra*.

[4] Compare *Clunie* v. *Stirling* and *M'Kellar's* case, *supra*, where motions were refused, with *Morrison* v. *Maclean's Trs.* and *Waddell* v. *Waddell's Trs.*, 12 July 1845, 7 D. 1017, where new trials were granted.

[5] *Clunie* v. *Stirling*, 17 D. 18.

[6] *Morrison* v. *Maclean's Trs.*, 27 Feb. 1862, 24 D. 625.

the settlement, because a man may have power of intellect to enable him to do one thing—to make one kind of mental exertion —and yet he may be totally incapable of making another." The ancient law of Scotland distinguished two classes of insane persons, namely, idiots or fatuous persons, and lunatics or furious persons requiring to be kept under restraint for the protection of themselves and others. But in the determination of questions of incapacity as affecting the validity of wills, a court of law has to deal with the milder types of mental disease,—with cases of dyspeptic hypochondria,—with cases of religious melancholy, accompanied by insane delusions,—with cases where some severe or unexpected strain has disturbed the springs of that delicate mechanism by which the mind communicates with external nature. The investigation of such cases has led to the tardy recognition of the notion of partial insanity; but whether the will of a partially insane person ought to be sustained is by no means so easy a question as has been supposed, because we do not know enough of the functions and mode of operation of the brain to be certain that a person may suffer from delusions of a definite character, and yet be sane in the broad sense of being able to take a rational view of his duties and obligations in such a matter as the making a will.

Application of physiological principles to cases of partial insanity or monomania.

494. It is true that the physiological conception of insanity does not furnish any rule for the determination of questions of testamentary capacity; more probably it renders the attainment of any such rule or criterion impossible; but it may at least be of service in correcting the tendency to theorise on this subject. It appears to have an important bearing on the phenomena of monomania, and of those intermissions of the disease which are termed lucid intervals. If it be admitted that the phenomena of insanity, such as delusions, result from a diseased or abnormal condition of the brain, it is difficult to maintain that a person may be insane as to the subject of his delusion and yet have disposing capacity. If the delusion is such as no rational person could entertain, and such as, in the opinion of competent judges, proves the existence of cerebral disease, it is impossible to say that the disease may not have interfered with the just exercise of the disposing faculty; and the right of the heir ought not to be taken away except by the testamentary act of a person who is in the full possession of his mental powers.[1]

Physiological view adverse to allowing efficacy to wills made during intermission of symptoms.

495. The physiological view of insanity is also adverse to the practice of allowing testamentary efficacy to wills made during these lucid intervals, which, from their transient nature, are evi-

[1] Of course, where a connection can be traced between the insane delusion and the inofficious will, it is *luce clarius* that the will is void, even though on other matters the testator may have manifested a certain degree of mental vigour. There is a reported case of this kind,—*Maitland* v. *Maitland's Trs.*, 1871, 10 M. 79.

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dently mere intermissions of the phenomena of insanity, and which cannot reasonably be attributed to a restoration of healthy action in the brain. The proof of a genuine lucid interval is extremely difficult, and when its duration has to be computed in hours, we should be strongly inclined, on that ground alone, to disbelieve in the restoration of the patient to a state of disposing capacity.

Recent decisions on cases of partial insanity.

496. The practice of sending cases involving an inquiry as to mental capacity to a jury (a practice which the writer hopes to see reformed) may explain the fact that there is little authority on this subject in the Court of Session Reports. Since the publication of the last edition of this work, three cases have been somewhat fully reported. In *Nisbet* v. *Nisbet*[1] a will executed by a gentleman who had been confined for years in a lunatic asylum was sustained. The case was one of "general insanity," from which, in the opinion of the Court, the patient had so far recovered as to be of disposing mind. The following observation is of very general application:—"The way to decide whether a man is sane or insane at any particular time has been very well stated by Lord Penzance in one of the cases referred to. There are, he says, two methods by which different classes of witnesses approach the question. Unskilled persons can only judge of the mental state of the person suspected of insanity by comparing it with their own, or with that of others with whom they are in daily intercourse; and if they perceive a great difference between them, they naturally and legitimately come to the conclusion that the mind is disordered or diseased. But when experts approach the consideration of the same question they have a different mode of comparison, because, having had previous experience of insane minds, they can compare these with the mind of the person suspected of insanity. If they can trace in his mind a number of the peculiarities which their experience has shown to exist in the minds of the insane, they naturally come to the conclusion that he is insane. It is generally by a combination of these two modes of reasoning, both of which are competent in a court of justice, that he arrives at a conclusion in cases of this kind."[2] The second case is that of *Maitland*, noted above. Then there is the very remarkable case of *Ballantine* v. *Evans*,[3] respecting the will of an officer in the army, who died by his own hand under circumstances which are sufficiently explained in the following observations taken from the opinion of the Lord Ordinary:—"It appears that for some time before his death, but for how long has not been ascertained, the testator had been suffering from mental disease, which exhibited

[1] *Nisbet's Trs.* v. *Nisbet*, 1871, 9 M. 937.

[2] 9 M. 955, per Lord Pr. Inglis.

[3] *Ballantine* v. *Evans*, 1886, 13 R. 652.

itself in depression, combined with certain physical symptoms, and in an insane delusion that accusations of a very distressing character had been made against him on various occasions by a number of unknown persons. But all the evidence goes to show that, apart from the particular symptoms of disease to which I have adverted, the general powers and faculties of his mind were unimpaired. He is said to have been a man of excellent judgment, who, on that account, was much consulted by his brother officers, and he retained his character for sound judgment to the last."[1] The will was upheld; and there is much force in the view expressed by Lord Moncreiff, that in this case the delusion which preyed on the testator's mind,—and it was a delusion in the sense that it had no real foundation,—was not such as no rational person could entertain, but might have arisen from remarks overheard and misconstrued, or from conduct towards himself which had no relation to the supposed accusations. It must be admitted that the law recognises the possibility of testamentary capacity co-existing with partial insanity; but such cases are treated as exceptional, and the principle is one that is necessarily confined within narrow limits.

Unsatisfactory state of the legal authorities on insanity.

497. It is not proposed to enter upon a discussion of the numerous cases which are contained in the English Reports, and in which the most various and discordant theories have been propounded. These cases, and the opinions expressed in them, are ably analysed in Williams on the Law of Executors, which is accordingly referred to.[2]

Physical incapacity as affecting the validity of a will.

498. Extreme bodily infirmity can only be regarded as a ground of reduction to the extent that it is an element of evidence under an issue of facility and circumvention.[3] The Court looks with just suspicion upon settlements obtained by interested parties, or their agents, from testators who, in consequence of illness or old age, are deprived of the full use of the faculties of sight, hearing, or speech.[4]

[1] 13 R. 661, per Lord Kinnear.

[2] Williams on Executors, 8th ed., pp. 19-38. One of the best expositions of the law in relation to the disposing capacity of persons labouring under insane delusions, as applied to an actual case (and the subject can only be usefully treated in its application to real cases), is the judgment of Lord Penzance in *Smith* v. *Tebbit*, Law Rep. 1 Pr. 398. In this case the testatrix, who had been allowed during her lifetime to retain the uncontrolled possession and disposal of her property, left a will leaving the residue of her fortune, amounting to £180,000, to a stranger, regarding whom she entertained insane delusions, and who appears to have exercised considerable influence over her. The Court refused to admit the will to probate. The case was a very critical one, and the judgment is instructive.

[3] *Simpson* v. *Gardner*, 11 Sh. 1049.

[4] *Gillespie* v. *Gillespie*, 11 Feb. 1817, F.C.; *Paterson* v. *Smith*, 2 Feb. 1809, Hume, 921; *M'Culloch* v. *M'Crackan*, 3 Dec. 1857, 20 D. 206; *Halliday* v. *Morison*, 27 June 1857, 19 D. 929. "The maker of a deed," said Lord Colonsay, in *M'Kellar* v. *M'Kellar*, 6 Dec. 1861, 24 D. 144, "may have had capacity when

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A distinction is to be taken between the physical incapacity of extreme old age, which is often accompanied by mental weakness, and such sources of error as blindness, or inability to speak and hear. Wills of persons deprived of sight may be executed either notarially or in the ordinary manner. And where proper precautions are taken (if such be necessary), and there is no suspicion of undue influence, there can be no doubt that the will of a deaf-mute will be effectual.[1] It is not a condition of the validity of the will of a blind person that it be read over to him before signature; but the will may be reduced upon proof that the granter was ignorant of its contents.[2] If notarial execution is resorted to, attention must be paid to the requisites of that mode of authentication as fixed by the decisions.[3]

Undated will not presumed to be executed after granter became insane.

499. If the granter of a holograph untested settlement die insane, there is no presumption that the will was executed during the period of insanity; and the grantee would seem to be entitled to a verdict on proving that the testator was sane at the date mentioned in the instrument, supporting the date as far as possible by other evidence.[4]

Disabilities of bastards removed by Statute.

500. The common law disability of persons of illegitimate birth was removed by 6 and 7 Gul. IV., cap. 22, which, on the grounds of "justice and humanity," enacted that it should thenceforth "be lawful to bastards or natural children, domiciled in Scotland, to dispose of their moveable estates by testament or last will, in like manner as other persons belonging to that country may do."

Disabilities of aliens.

501. An alien, by the common law of Scotland, cannot be the

aided, and no capacity without aid; and the withholding of such aid as may be necessary to give the capacity to execute a deed may amount to fraud. . . . For instance, a defender may have prevented a professional person from having access to the person granting the deed, and thus have prevented him having that aid which was necessary to give him capacity for understanding it."

[1] 1 Jarman on Wills, 5th ed. pp. 35-36; *Dickinson* v. *Blisset*, 1 Dicks. 268; *re Harper*, 6 M. &. Gr. 731, 7 Scott N.R. 431. In Pet. *Kirkpatrick*, Lord Colonsay observed that a deaf-mute, capable of communicating by signs, might execute a deed by notaries. "The want of the power of speech," he observed, "does not disable a party from taking the management of his affairs, especially when not combined with the want of power of hearing. And even when it is so accompanied, there are many instances in which persons so afflicted are not merely perfectly capable of managing their own affairs, but who exhibit proof of the highest intellect. The intellect may be reached by education; and such persons are capable of receiving education" (8 June 1853, 15 D. 736).

[2] *Duff* v. *Earl of Fife*, 17 July 1823, 1 Sh. (Ap. Ca.) 498; *Kir* v. *Hotchkis*, 23 May 1837, 15 Sh. 983; *Reid* v. *Baxter*, 19 Feb. 1840, 1 Rob. 66, affirming 16 Sh. 273.

[3] Stat. 1579, cap. 80, amending 1540, cap. 117; *Reid* v. *Baxter*, *supra*, and cases there cited.

[4] *Waddell* v. *Waddell's Trs.*, 7 D. 605, per Lord Moncreiff. The presumption of law is now in favour of the date stated in the holograph will (Conveyancing Act, 1874, § 40).

proprietor of heritable estate;[1] in England the disability does not extend to lands acquired by purchase.[2] An alien, therefore, cannot make a will or execute a trust embracing heritable estate until he shall obtain letters of naturalisation, or a certificate of naturalisation under the Act 7 and 8 Vict., cap. 66.[3] As regards the disposal of moveable estate, the rights of an alien are as extensive as those of natural-born subjects, with the single exception that they are liable to be suspended during the continuance of a war with the country of which he is a subject.

Treason and outlawry as affecting testamentary capacity.

502. By the English law of treason—extended by the Union to Scotland—all lands, held by whatsoever tenure or title, are forfeited to the Crown on conviction. To avoid forfeiture, conveyances were at one time executed in favour of confident persons, with the view of creating a trust by anticipation in favour of the granter and his heirs;[4] for, after conviction, no trust of heritage would be effectual. The effect of outlawry and civil denunciation on property is different from that of treason. The denounced rebel or fugitive has no *persona standi in judicio*. His single escheat instantly falls; and if he continues unrelaxed for a year and day, his liferent escheat falls, and the rents and profits of his heritable estate go to the Crown, or other immediate lawful superior.[5] The same results follow conviction of a capital crime. But it was not doubted that a denounced rebel retained the fee of his estates; and it is therefore difficult to understand the grounds upon which a minority of the Court, in a modern case,[6] disputed the right of such persons to exercise the *jus disponendi*. It is now settled that a party under sentence of fugitation may execute a settlement of heritable property.[7] The only restriction on his proprietary right is, that he cannot do any act in prejudice of the superior's liferent interest. Thus it has been held that an heir of entail, whose liferent escheat had fallen, could not, by suffering an adjudication to pass, incur an irritancy, so as to pass the estate to the next substitute.[8]

Right of disposal of estate subsists notwithstanding fugitation.

[1] Ersk. 3, 10, 10; *Dundas* v. *Dundas*, 15 Nov. 1839, 2 D. 31. On this nearly obsolete point of law, see also *E. of Perth* v. *Lady Willoughby's Trs.*, 1869, 7 M. 642, where, amongst other points, the opinion was expressed that a right of succession to land might be transmitted *through* an alien who died before the passing of the Alien Act, 7 and 8 Vict., cap. 66.

[2] Lewin on Trusts, 9th ed. 25.

[3] 7 and 8 Vict., cap. 66, § 6.

[4] *Mackenzie* v. *M'Donald*, 1736, Elch. "Trust," No. 4; *Com. of Forfeited Estates* v. *Mackenzie*, Robertson, 263-280; *Hamilton* v. *Hamilton*, 1669, M. 16,116.

[5] Ersk. 2, 5, 59, and 66. The consequences of escheat are frequently remitted by the Crown, under the authority of modern Statutes, by which the restraints on the alienation of royal property have been relaxed to the extent of enabling the Crown to restore lands to the family of the former owner, or to give effect to his disposition. See 6 Geo. IV., cap. 17, the latest Act.

[6] *Macrae* v. *Macrae*, 22 Nov. 1836, 15 Sh. 54, 1 M'L. & Rob. 645.

[7] *Macrae's* case. See the learned and exhaustive opinion of Lord Medwyn, 15 Sh. 64.

[8] Ersk. 2, 5, 67; *Scot* v. *Scot*, 1722, M.

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Bankruptcy.

503. The sequestration of a bankrupt's estate vests all his heritable and moveable estate in the trustee for the benefit of his creditors.[1] But the bankrupt has an assignable interest in the reversion, which is capable of being vindicated by action,[2] and which may therefore be the subject of a will or settlement. The same observation is applicable to the question of the testamentary capacity of an insolvent person who has granted a disposition *omnium bonorum* for behoof of creditors.

Effect of homologation or adoption in removing objections to wills and settlements.

504. Though a settlement at the time of execution may be subject to objection or reducible on the ground of incapacity, yet if the granter adopt or accredit the instrument, after he acquires the disposing capacity, it will thenceforth be effectual as his deed. On this principle, deeds by minors and married women may be homologated after attaining independence. The term "adoption," which has come into use chiefly in relation to counter issues in reductions on the head of forgery, seems to be properly applicable to acts whereby a party accredits that which was *ab initio* not his deed, but which becomes so by his delivery of the deed or acknowledgment of the subscription as his. In such cases the date of adoption is in law the date of the deed. Homologation, by which a party waives objections to the formality of the deed, or objections going to the fairness of the transaction—*e.g.*, minority and lesion, or facility—seems to give a retrospective validity to the instrument from its date. "When," says Professor Bell,[3] "the original party homologates, he either *ratifies* a deed or obligation already executed but imperfectly, or he adopts and gives effect to what would otherwise be null. When there is already an obligation existing, though imperfect or subject to exception, homologation may have the effect of confirming it as good from the first; where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect."

505. In the case of *Gall* v. *Bird*,[4] where a contract of dissolu-

3673. In *Coombs* v. *The Queen's Proctor*, 2 Rob. 547, Sir John Dobson decided that where the *wife of a felon*, under sentence of transportation for a term of years, died *intestate*, leaving property acquired by herself subsequent to his conviction, such property belonged, not to her next of kin, but to the Crown. However, it has been decided in other English cases (*re Martin*, 2 Rob. 405, 15 Jur. 686; *Atlee* v. *Hook*, 23 L.J. Ch. Ca. 776) that the wife of a transported felon has the *testamenti factio* as to her separate acquisitions; an equitable exception, which may perhaps be extended to married women in Scotland, on the analogy of the cases of *Churnside* v. *Currie*, 11 July 1789, M. 6082, and *Orme* v. *Diffors*, 30 Nov. 1833, 12 Sh. 149. But see *contra*, *Dick* v. *Donald*, 12 Dec. 1826, 2 W. & S. 522.

[1] 19 and 20 Vict., cap. 79, § 102.

[2] § 155; and see Bell's Com. 7th ed. 140, and cases there cited.

[3] 1 Bell's Com. 5th ed. 145; Ersk. 3, 3, 47.

[4] *Gall* v. *Bird*, 3 July 1885, 17 D. 1027.

tion of partnership and trust assignation was brought under reduction, on the grounds of mental incapacity, facility, and circumvention, the Court, after consideration, allowed an issue of homologation as counter to the issue of facility; but refused to allow the same issue to be taken as counter to the general issue on the deed; being of opinion that, if insanity were proved, the deed could only be set up by a substantive action of declarator.[1]

Homologation a defence to reductions on the ground of insanity or facility.

506. Reasoning from analogy, there appears to be no good reason why the delivery of a void testamentary instrument, or its adoption in a subsequent writing—after the testator is rehabilitated—should not be as effectual to obviate objections founded on personal disability, as those acts admittedly are to obviate objections to the execution of the instrument.[2]

Adoption by the granter after removal of disability.

507. A settlement may also be homologated by one who has an adverse right; in which case his right of challenge, upon any ground of which he was aware at the time of homologation, is cut off.[3] But there is no room for the application of the doctrine if the homologating party were ignorant of the objection.[4]

Homologation by the disponee or beneficiary.

[1] Erskine lays down that deeds executed by a pupil, or insane person, are incapable of being homologated; but it would seem they may be adopted. The *labes* cannot be of a more radical character in the cases put by the learned author than in the case of forgery. See the passage, 3, 3, 47.

[2] It would seem that a will made in England, during the subsistence of a personal disability, may be validated by *republication* after the testator is *sui juris*—1 Jarman on Wills, 5th ed. 34—that is, by either renewing the solemnities of authentication, or adopting the will by reference in some subsequent writing; *ibid.* 1, 157.

[3] As to homologation of settlements by interested parties, see *M'Michan* v. *M'Michan's Trs.*, 22 June 1839, 1 D. 1085; *Murray* v. *Murray*, 21 Jan. 1826, 4 Sh. 374, N.E. 377; *Leiper* v. *Cochrane*, 9 July 1822, 1 Sh. 552, N.E. 506; *Erren* v. *Mags. of Montrose*, 17 Nov. 1830, 4 W. & S. 346, reversing 6 Sh. 479; *Kyle* v. *Allan*, 23 Feb. 1832, 11 Sh. 87; *Fraser* v. *Fraser*, 7 Nov. 1834, 13 Sh. 703.

[4] Ersk. 3, 3, 48; Bell's Pr. § 27.

CHAPTER XIV.

TESTAMENTARY WRITINGS, HOW CONSTITUTED.

1. Authentication of Testamentary Writings.
2. Effect of Alterations, Marginal Additions, &c.
3. Codicils and the Effect of Referential Words in a Will.
4. Destinations in Bonds, Title-Deeds, and Securities.

508. The law of Scotland does not prescribe any special form which can be regarded as indispensable to the due expression of a testamentary intention, but custom has established certain forms of testamentary instruments by which estates of any description may be most conveniently settled or bequeathed.

Testament—General disposition—Trust-disposition and settlement—Deed of entail.

509. Where the estate consists of personal or moveable property, and the testator contemplates an immediate distribution of his estate after his death, his will may be conveniently expressed in the form of a testament containing an appointment of executors. A will of mixed heritable and moveable estate, with a purpose of immediate succession, may take the form of a general disposition and settlement. Where the final distribution of the succession is postponed to a period which may not occur until a considerable time after the testator's death, provision must be made for the interim custody and management of the estate; and for the accomplishment of this purpose a conveyance of the estate to trustees is requisite. As the purposes of modern wills usually require the preservation of the testator's estate for a period of uncertain duration, the machinery of a trust has come to be regarded as a necessary part of a will, insomuch that the trust-disposition and settlement has, in Scotland, superseded all other forms of settlement for the distribution of mixed succession. Settlements of landed estate in favour of a series of heirs are sometimes made by immediate grant in the form of a deed of entail, sometimes by way of a deed of direction to trustees to execute an entail in favour of heirs therein named and designed, the last-mentioned form being often chosen where the settlor contemplates the acquisition of additional property. Testamentary purposes may, besides, be contained in other deeds, as, for instance, in marriage-contracts, which almost always contain destinations to heirs or persons designated, failing issue of the marriage.

SECTION I.

Authentication of Testamentary Writings (Will or Instructions).

Where date important, a will ought to be witnessed.

510. I. Statutory Attestation.—For many purposes it is necessary to determine the order, in point of time, of the execution of testamentary instruments. For this reason a will should, if possible, be executed in presence of witnesses, since a holograph will does not prove but only establishes a presumption as to the date of its execution.

Statutes regulating the authentication of tested wills and deeds.

511. The subject of the formal authentication of testamentary writings belongs properly to the law of evidence. A brief reference to the regulating Statutes which are in force may suffice for the purposes of this book. The Act 1555, cap. 29, made subscription imperative,[1] subject to certain conditions as to notarial subscription, which were superseded by the more specific regulations of the Act 1579, cap. 80.[2] That Act requires the attestation of two notaries and four witnesses to writs not signed by the granter. By the Conveyancing (Scotland) Act, 1874, section 41, any deed, instrument, or writing may, after having been read over to the granter, be executed (in the form prescribed) on behalf of such granter, who from any cause, whether permanent or temporary, is unable to write, by one notary public or justice of the peace subscribing in his presence and by his authority before two witnesses.[3] By the Act 1584, cap. 4, as extended by custom, sealing is dispensed with. Under the Statute 1593, cap. 179, the name and designation of the writer must be inserted in the body of the writ;[4] with reference to which, and to the later Statute 1681, it has been held that the addition of "writer hereof" to the name of one of the witnesses (designed in the testing clause) is a sufficient compliance with the terms of the statute.[5] Where, in a testing clause, the granter declared that

[1] Note that the objection of erasure does not touch the case of the granter's subscription being written on an erasure, because it is his handwriting; *Brown* v. *Brown*, 1888, 15 R. 511. If the reader desires to know what amounts to a signature or subscription, he may consult the Lord Ordinary's note in the great case of *Stirling Stuart* v. *Stirling Craufurd's Trs.*, 1885, 12 R. 610, from which, and the opinions delivered in the Inner House, he will learn that a subscription may be illegible, and yet be effective.

[2] See the important case of *Henry*, 1871, 9 M. 503, where all the authorities are collected.

[3] A notary cannot notarially execute a deed in which he himself is interested; *Ferrie* v. *Ferrie's Trs.*, 1863, 1 M. 291. As to the objection that he is agent for a party to the deed, see *Lang* v. *Lang's Trs.*, 1889, 16 R. 590. As to whether the words "read over" in the docquet (1874 Act) are *inter essentialia*, see *Watson* v. *Beveridge*, 1883, 11 R. 40.

[4] *Callander* v. *Callander's Trs.*, 17 Dec. 1863, 2 Macph. 291.

[5] *Dronnan* v. *Montgomerie*, 1716, M. 16,869; *Macpherson* v. *Macpherson*, 7 Feb. 1855, 17 D. 358.

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he had subscribed these presents, consisting, &c., stamped according to law, by W. M., therein designed, the omission of the word "written" was held not to be material.[1] By the Act 1681, cap. 5 (Lord Stair's Act), it is enacted, "that only subscribing witnesses in writs to be subscribed by any party hereafter shall be probative, and not the witnesses insert not subscribing,[2] and that all such writs to be subscribed hereafter wherein the writer and witnesses are not designed shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses." The subscription is declared not to be effectual unless the witnesses either saw the party subscribe, or give warrant to the notary, or that at the time the party did acknowledge his subscription.[3] It is not necessary that the acknowledgment should be made to the two witnesses in presence of each other.[4] The Act 1696, cap. 15, regulating the subscription and pagination of deeds written book-ways, has been repealed as regards pagination by 19 and 20 Vict., cap. 89. By the 38th section of the Act of 1874 deeds are to be probative, although the writer is not named or the number of pages specified, or that the witnesses are not named or designed in the deed, provided that designations shall be appended to or follow their subscriptions; and by the 39th section, any deed subscribed by the granter, and bearing to be attested by two witnesses subscribing, may be set up by proof in any action in which the deed is founded on, or under a summary application to the Court or the Sheriff.[5] The 39th section has had the effect of saving many wills which might have been held invalid under the too strict require-

Modern Statutes.

[1] *Johnston* v. *Pettigrew*, 16 June 1865, 3 Macph. 954.

[2] A trustee does not seem to be disqualified from being an instrumentary witness to the trust-deed,—*Mitchell* v. *Miller*, 1742, M. 16,900; nor a special legatee,—*Ingram* v. *Steinson*, 1801, M. "Writ," App. 2; nor even a general legatee,—*Graham* v. *Montrose*, 1685, M. 16,887. The decision in *Simsons* v. *Simson*, 1883, 10 R. 1247, may be taken as decisive on this point, and note that the late Lord President there observed that he could not see any good foundation for the suggested introduction of the English rule that the bequest to the instrumentary witness only should be void, The English rule depends on Statutes 25 Geo. II., cap. 6, and 1 Vict., cap. 26, §§ 14, 15.

[3] See *Baird's Tr.* v. *Murray*, 1883, 11 R. 153; *Morrison* v. *Maclean's Trs.*, 1862, 24 D. 626, 1 M. 304; it was there held that the averment that the instrumentary witnesses did not see the subscription adhibited, nor was it acknowledged, must be proved, and that a *non memini* was not proof. It is not necessary that an acknowledgment should be in words.

[4] *Hogg* v. *Campbell*, 12 March 1864, 2 Macph. 849.

[5] Under this section it suffices that a will or other writing, although consisting of more than one sheet of paper, is subscribed at the last of the last page, the authentication of each sheet or page being dispensed with; *M'Laren* v. *Menzies*, 1876, 3 R. 1151; *Brown* Petr., 1883, 11 R. 401. The section is not retrospective; *Gardner* v. *Lucas*, 1878, 5 R. (H.L.) 105, affg. 5 R. 538; and see observations of Lord President Inglis as to the 38th section.

ments of the Scottish Statutes, and of the curious and quaint rule of law according to which the efficacy of a testamentary deed depends not at all on the point whether the testing clause was extended in the granter's lifetime, and in virtue of his unrecalled mandate to his solicitor, but simply and solely on the question whether the omission was supplied before the deed had been produced in judgment, *i.e.*, given to the clerk of Court for inspection by the other party.[1] The mere fact that two persons saw the testator sign a will does not entitle them to sign as witnesses *ex intervallo*, if they were not called by the testator as instrumentary witnesses.[2] The limits of this treatise preclude us from attempting to give even an outline of this branch of the law of evidence as settled by decisions.[3] The subject is fully treated in Mr. Dickson's treatise on Evidence, and in the works of Menzies and Bell on Conveyancing.[4]

Privileges of testamentary deeds in relation to notarial execution.

512. It is necessary here to take notice of the subject of the privileges accorded by custom to deeds of a testamentary nature; under which description are comprehended wills of moveable estate and deeds containing provisions *intuitu mortis*. On this subject Erskine has observed, in a passage frequently cited, that "testamentary deeds are so much favoured, that if the testator's intention appears sufficiently, they are sustained although not quite formal, especially if they be executed where men of skill in business cannot be had."[5] In practice, the privileges of testamentary deeds are confined to the single case of notarial execution. By a custom referred to by all the institutional writers,[6] and which has now the force of law, a testament of moveables by a party unable to write may be executed by one notary in presence of two witnesses.[7] And by

[1] Compare *Veasey* v. *Malcolm's Trs.*, 1875, 2 R. 748, with *Hill* v. *Arthur*, 1870, 9 M. 223, and previous cases there cited.

[2] *Arnott* v. *Bart*, 1872, 11 M. 62. The will was reduced.

[3] As more directly related to wills and codicils, the cases may be here noted in which (notwithstanding its liability to fraudulent alteration) pencil has been sustained as holograph writ. The cases are *Williamson* v. *Kennedy*, 19 D. 443; Sp. Ca. *Muir's Trs.*, 1869, 8 M. 53; Sp. Ca. *Simsons* v. *Simson, supra.* It may be kept in view that the doctrine of *rei interventus*, which is of course inapplicable to testamentary writings, may be founded on to support the provisions of a contract of marriage in so far as these are onerous; and it was so held in two cases where objections were taken to notarial subscriptions, the objection in one of the cases being necessarily fatal if the case had been *in nudis finibus contractus*,—*Nisbet* v. *Newlands*, 1630, M. 17,016; *Lang* v. *Lang's Trs.*, 16 R. at 598. Hence the mere subscription of the party may be sufficient. See *Kibble* v. *Stevenson*, 18 Dec. 1830, 9 Sh. 233; *Dunlop* v. *Greenlees' Trs.*, 2 Macph. 1, 3 Macph. (H.L.) 46.

[4] Dicks. Evid., § 636 *et seq.*; Menzies Lect. on Conv., cap. 2; Bell's Lect. on Conv., p. 23 *et seq.* As to the form and style of trust-deeds, see the Juridical Styles, 4th ed. vol. i. p. 267, and the Titles to Land Acts, 1858 and 1860.

[5] Ersk. 3, 2, 23. See *Norvel* v. *Ramsay*, 1763, M. 12,290; *Kerr* v. *Hay*, 1708, M. 16,968 (*bis*).

[6] Stair, 3, 8, 34; Ersk. 3, 2, 23; 1 Bell's Com. 7th ed. p. 341.

[7] See *Bog* v. *Hepburn*, 1623, M. 16,960;

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the Statute 1684, cap. 133, which prohibits clergymen from acting as notaries, there is an exception in regard to "the making of testaments." The effect of this Act, as limited by judicial construction, is that a will signed for the testator by the clergyman of his parish, before two witnesses, is valid and probative.[1] Wills executed by the intervention of clergymen have, however, in some cases been set aside, in respect of deviation from the statutory requirements, *e.g.*, the omission to state that the clergyman's subscription was adhibited by the authority of the testator;[2] or the adhibition of the name of the testator instead of that of the clergyman.[3]

Common law requisites of the authentication of holograph wills.

513. II. HOLOGRAPH WRITINGS.—At common law a deed or testamentary writing holograph of the granter is not required to be attested, but is completed by the mere subscription of the writer. Such writings, being wholly regulated by the common law,[4] admit of the application of a very liberal canon of criticism in the determination of questions relating to their authority or validity. As early as the time of the institutional writers,[5] the privileges of holograph deeds had been extended to such as were holograph in the substantial clauses,—as, for example, in the case of testaments holograph in the sums bequeathed and in the names of the legatees;[6] while, conversely, holograph writings in which sums or names were inserted by another hand were deemed invalid.

514. The case of *Macdonald* v. *Cuthbertson*[7] raised the question whether a will consisting of a printed form filled up in the testator's handwriting could receive effect as a holograph writing, or as a writing not coming within the scope of the Acts which regulate the attestation of deeds written *aliena manu*. It was held by a majority of the judges that this will could not receive effect. It was pointed out by the writer, who dissented from the judgment, and retains the opinions there expressed, that the exceptional

Stodart v. *Arkley*, 1799, M. 16,857; and *contra*, *Galletly* v. *Macfarlane*, 1 Aug. 1843, 6 D. 1. In the case of *Ferrie* v. *Ferrie*, 23 Jan. 1863, 1 Macph. 291, where a notarial attestation of a trust-settlement of heritable and moveable estate was held null on the ground that one of the subscribing notaries was a trustee with the power of appointing himself factor, and receiving remuneration for his services. It was held that the instrument could not be sustained even as a settlement of moveables, the deed being in its inception a deed of importance, and dealing with the granter's whole succession. See the cases there cited, and also 2 Pat. 415; 3 Pat. 365; 3 Pat. 671.

[1] *Hepburn* v. *Waughton*, 1606, M. 16,827; *Williamson* v. *Urquhart*, 1688, M. 16,838.

[2] *Mackenzie* v. *Burnett*, 1688, M. 16,838; *Williamson* v. *Urquhart*, *supra*.

[3] *Trail* v. *Trail*, 1805, M. 15,955. See *Gray* v. *Ballegerno*, 1678, M. 16,296.

[4] Stair, 4, 42, 6; Ersk. 3, 2, 22; 1 Bell's Com. 7th ed. p. 341.

[5] See Stair and Ersk., *supra*.

[6] *Vans* v. *Malloch*, 1675, M. 16,885, and case of *Hartree* there cited; *Panton* v. *Gillies*, 22 Jan. 1824, 2 Sh. 632, N.E. 536.

[7] *Macdonald* v. *Cuthbertson*, 1890, 18 R. 101.

privileges of holograph writings depend on the circumstance that the Scottish Statutes do not in fair construction apply to deeds other than manuscript deeds written by a foreign hand. These Statutes, he considers, do not apply to wills which, so far as written, are wholly in the testator's hand. As to the 149th section of the Titles Act, 1868 (virtually abrogated by the 38th section of the Conveyancing Act, 1874), it is impossible to read the section without seeing that it contemplates the case of a printed form, filled in *manu aliena*, and no other case; and, apart from the consideration that the 149th section does not profess to take away any existing right, the argument which Lord Kinnear founds upon that section does not appear to be valid. All the reasons which lead to the exception of holograph deeds from the Statutes apply to a case of this kind, the main reason being the impossibility of interpolation.

Holograph writing, whether intended for a will, or as a paper of instructions.

515. The chief difficulty in relation to holograph consists in the determination of the question whether a holograph writing is a will or is merely a memorandum or paper of instructions. The case of *Munro* v. *Coutts*[1] is an instructive example. A testator having previously executed a trust-settlement of his whole estate, and also a will in the English form, and wishing to alter his testamentary dispositions, wrote to his solicitor, saying, "I send you the codicil I wish to be made to my last will and testament." The enclosure, which was dated and signed, began—"I wish a codicil to be made to my last will and settlement in the following manner." It was held by Lord Eldon, on a consideration of the correspondence between the deceased and his solicitor, and other facts and circumstances, that the paper was intended as *instructions* for the preparation of a codicil, and was not testamentary. Again, in *Lowson* v. *Ford*,[2] three signed papers, containing lists of names with sums of money written opposite to them, were held to be mere *memoranda* for the writer's consideration.

Extrinsic evidence; to what effect admissible.

516. It is to be observed that there are two elements in the question whether a writing is of a testamentary character—the one intrinsic, and the other extrinsic. Where a holograph will or codicil contains proper words of disposition or bequest, and either includes a regular nomination of executors or trustees, or bears reference to a previously executed will or trust-deed containing

[1] *Munro* v. *Coutts*, 3 July 1813, 1 Dow, 437; with this authority it is difficult to reconcile the decision in *Scott* v. *Sceales*, 5 Feb. 1864, 2 Macph. 613, giving effect to a letter by the deceased lady to her man of business; but these are cases admittedly of great difficulty.

[2] *Lowson* v. *Ford*, 20 March 1866, 4 Macph. 631. Another paper of a similar character was sustained, in respect that it bore an indorsation in the hand of the deceased that her trustees would act upon it in case she should be taken away suddenly.

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such a nomination, it would seem that extrinsic evidence is not admissible for the purpose of proving that it was not intended to have a testamentary operation.[1] On the other hand, where a writing contains no words of testamentary disposition or intention, but is simply (as in the case of *Lowson*) a list of names and sums, it would seem to be incompetent to set up such a writing as a will by extrinsic evidence of intention.[2] Within the limit of these extremes extrinsic evidence has been liberally admitted, for the purpose of ascertaining whether papers which are expressed in testamentary language are testamentary writings, or are merely of the nature of drafts, minutes, or instructions for the preparation of such writings. Among the more recent cases we find that a holograph writing bearing to be a "draft,"[3] and another beginning "Memorandum to let Mr. T. (testator's agent) know,"[4] were not sustained as testamentary writings. The most remarkable case of the kind since *Munro* v. *Coutts* is the case of *Hamilton* v. *Whyte*,[5] where a paper titled "Notes of intended settlement by Walter Whyte of Bankhead," was held in the Court of Session and in the House of Lords to be a testamentary writing disposing of the granter's heritable and moveable estate. According to Lord Moncreiff, "The writing itself in its substance is a completed settlement. It is the work of a man with some knowledge of legal phraseology, is evidently carefully extended from a draft, written in a fair and distinct hand, very clearly expressed in appropriate language, and signed by the writer." Lord Selborne emphasised the point that the writing was in all its provisions expressed in *de præsenti* language. The proof which was allowed admittedly threw no light on the question of completed intention, but brought out the facts that the testator left no other will, and had never given instructions to an agent for the preparation of one. The question remained

[1] See for example *Royal Infirmary* v. *Muir's Trs.*, 9 R. at pp. 355-6, per Lord President; *Tronsons* v. *Tronson*, 1884, 12 R. 155; *Robb's Trs.* v. *Robb*, 1872, 10 M. 692. In the case of *Munro*, Lord Eldon observed that extrinsic evidence was properly admitted, "as the paper was of a doubtful and ambiguous character, and required explanation," 1 Dow, 451.

[2] *Lowson*, *ut supra*; *Colvin* v. *Hutchison*, 1885, 12 R. 947. These cases, and the cognate case of *Baird* v. *Jaap*, 18 D. 1246, are discussed in Chapter XVIII., Section IV., under the head of "Uncertainty" in Wills. "I know of no instance in the whole range of cases of this class in which a mere enumeration of names and figures was held an effective declaration of testamentary intention when there were no words indicative that the names were intended to be those of parties to be benefited by the testator, and the figures to be indicative of bequests or legacies which those parties were to receive;" per Lord Cowan, 4 Macph. 638.

[3] *Forsyth's Trs.* v. *Forsyth*, 1872, 10 M. 616.

[4] *Cunningham* v. *Murray's Trs.*, 1871, 9 M. 713.

[5] *Hamilton* v. *White*, 1882, 9 R. (H.L.) 53; affg. 8 R. 940.

whether the title or heading "reduces this very careful composition from an expression of present testamentary intention, which its terms import, to the level of a mere memorandum of what the writer thought he might possibly do at some future time."[1] In the opinion of the Court and the House of Lords, the word "notes" in the title was not inconsistent with testamentary intention, since the word might be taken (it is understood) as equivalent to codicil in the classical sense; and the expression "intended settlement" was consistent with the notion of a present, though ambulatory, testamentary intention. Lord Selborne in his judgment founds largely on the English probate cases of the period antecedent to the Wills Act; but while reluctant to express dissent from an authority so high, the writer ventures to add that it admits of easy demonstration that prior to the Wills Act wills were admitted to probate in England which could not possibly have been sustained by a Scottish Court.

Bilateral deeds, holograph of one of the parties.

517. A mutual contract or mutual settlement *inter vivos*, written by one of the parties and signed by all, will not always receive effect even as a holograph writing of the party who wrote it out,[2] though it may be validated *rei interventu*; the principle being that there is no contract unless all the parties are bound. But in the case of *Macmillan* v. *Macmillan*,[3] an entry on the fly-leaf of a family Bible, signed by husband and wife, the entry being in the handwriting of the husband, and bearing that "the longest liver is to have all that remains after our debts are paid," was sustained as a bequest of the husband's moveable property. On this case Lord Cuninghame observed: "In an ordinary agreement *inter vivos*, where one party is set free, there is generally a presumption that the other had the will to be set free too. But here there is no such presumption. There is no ground for inferring that the man himself wished his money to go otherwise than as this paper plainly says."[4] It would seem, therefore, that a mutual will, holograph of one of the parties, is effectual as a testamentary writing of the party by whom it is written. And it may be added, that a docquet holograph of the other party would operate as a ratification of his part of the settlement.[5]

518. It appears to be settled by authority that a writing pur-

[1] 8 R. 948. See also *Ritchie* v. *Whish*, 1880, 8 R. 101.

[2] *Miller* v. *Farquharson*, 29 May 1835, 13 Sh. 839; *Spreul* v. *Wilson*, 1809, Hume, 920.

[3] *Macmillan* v. *Macmillan*, 28 Nov. 1850, 13 D. 187; and see *Lavrie* v. *Lawrie*, 14 Jan. 1859, 21 D. 240; *Wilson's Trs.* v. *Stirling*, 13 Dec. 1861, 24 D. 163.

[4] 13 D. 190.

[5] *Johnstone* v. *Coldstream*, 30 June 1843, 5 D. 1297; *Lawrie* v. *Lawrie*, 14 Jan. 1859, 21 D. 240; *Macintyre* v. *Macfarlane's Trs.*, 1 Mar. 1821, F.C.; *Dunlop* v. *Greenlees' Trs.*, 2 Macph. 1; 2 June 1865, 3 Macph. (H.L.) 46.

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In what cases a testamentary writing is presumed to be holograph.

porting to be holograph is receivable as such until the contrary is proved.[1] The ratio of this rule of evidence is not apparent, because on the supposition that the writing is forged, we have only the forger's certificate that the writing is genuine. In the absence of a statement in a will that it was written by the granter, an executor applying for confirmation undertakes the onus of proving its validity. On this subject Erskine observes :[2] "Holograph writings ought regularly to mention that they are written by the granter ; in which case they are presumed holograph unless the contrary be proved. But though this should be neglected, a proof of holograph would be admitted, either *comparatione literarum* or by witnesses who saw the deed written and signed." In *Anderson* v. *Gill*[3] it was contended by the executor that the onus of proving the will to be the deed of the testator was displaced by proof that the signature was in the same handwriting as the body of the deed. But it was held by the House of Lords, affirming the judgment of the Court of Session, that it is incumbent on the executor to show that the will is in the handwriting or is holograph of the granter.[4] This rule applies to marginal alterations of and additions to holograph writings, as well as to words written on erasures ; and therefore a general statement by the granter that the will was written by himself, does not relieve the executor from the necessity of showing that the will in its altered condition is an authentic testamentary writing.

Signature is essential to the authentication of a holograph will or codicil.

519. A holograph will (according to the latest and best authority) is not valid unless authenticated by the testator's signature ; for if not subscribed, such writs are, as Lord Stair observes, "understood to be incomplete acts, from which the party hath resiled ;" though he adds, "if they be written in count books, or upon authentic writs, they are probative, and resiling is not presumed."[5] In accordance with this opinion, unsigned holograph wills, though commencing with the testator's name, have been held to be incomplete and ineffectual.[6] The ground of decision in the three cases cited was the same, as the following sentences show :— "The necessity of subscription to a will is a matter which depends on no technical rule, such as the use of dispositive words in con-

[1] Ersk. 3, 2, 22 ; 1 Bell's Com. 7th ed. p. 341. *Rothes* v. *Leslie*, 1635, M. 12,605 ; *Turnbull* v. *Doods*, 29 Feb. 1844, 6 D. 896 ; *Robertson* v. *Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236 ; *Waddell* v. *Waddell's Trs.*, 13 May 1845, 7 D. 607, per Lord Moncreiff.

[2] Erskine, *supra*.

[3] *Anderson* v. *Gill*, 16 April 1858, 3 Macq. 180.

[4] 3 Macq. 186.

[5] Stair, 4, 42, 6.

[6] *Dunlop* v. *Dunlop*, 11 June 1839, 1 D. 913 ; *Skinner* v. *Forbes*, 1883, 11 R. 88 ; *Goldie* v. *Shedden*, 1885, 13 R. 138. This rule was relaxed in a very peculiar case, *Russell's Trs.* v. *Henderson*, 1883, 11 R. 283 ; and see *Gillespie* v. *Donaldson's Trs.*, 22 Dec. 1831, 10 Sh. 174.

veying heritage, but is familiar to all the lieges without exception. Every man knows the difference between a deed that is signed and one that is unsigned. It appears to me, therefore, that the deceased must have believed and understood that the writing was not effectual so long as he withheld his subscription from it, and that, if we now sustained it as a valid instrument, we should be making a will which the party died believing to be ineffectual."[1] "The rule (of Lord Stair) has a peculiar applicability to testamentary writings, for if a man, making or writing his own will, lays it aside without signing it, he must be taken to mean that he wants more time to consider whether he should subscribe that will at all, or only after he should have made certain alterations on it."[2] "It is very common for persons who are possessed of property to make memoranda of what they propose to do for their relatives when they think it proper to execute a will, and it most frequently happens that such memoranda are left unsigned for future consideration. If it is known and understood that subscription is necessary to a will, the existence of such memoranda will not be a cause of embarrassment either to the writer in his lifetime (in case he may have mislaid them) or to his executors after his death."[3] A notary's holograph docquet, authenticating the deed of a person who cannot write, has been sustained although not subscribed, when it contained the notary's name *in gremio*.[4] And an unsigned codicil may be adopted by a holograph docquet.

Exception in case of notarial docquet.

520. By the Conveyancing Act, 1874, section 40, "Every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears." Under the older law holograph deeds, if the date of execution was not cleared up, were presumed to be executed on deathbed; but this objection is also displaced by Statute as to deeds thereafter executed.[5] Since the abolition of the right of challenge *ex capite lecti*, the question is no longer important.

Date of a holograph will.

521. Reduction *ex capite lecti* being a privilege personal to the heir, it follows that a holograph settlement of heritage was effectual if the privilege was renounced.[6] And it may be added that the date of a settlement *inter vivos* can neither be questioned by the granter of the settlement,[7] nor by a grantee who has accepted the conveyance in his favour.[8]

Proof of date of settlement *inter vivos*.

[1] 1 D. 921, per Lord Fullerton.

[2] 11 R. 90–91, per Lord Pr. Inglis.

[3] 13 R. 140, Lord Ordinary's note.

[4] *Cullen* v. *Thomsons*, 1731, M. 16,842; *Gordon* v. *Murray*, 1765, M. 16,818.

[5] Ersk. 3, 2, 22; and see Stair, 3, 4, 29; Ersk. 3, 8, 96. *Waddell* v. *Waddell's Trs.*, 1845, 7 D. 605; and see *Suttie* v. *Ross*, 1838, 16 Sh. 435, per Lord Pr. Hope.

[6] Tait on Evidence, 106; Dickson on Evidence, § 764.

[7] *E. Dunfermline* v. *E. Callander*, 1674, 1 Br. Sup. 703.

[8] *Scott* v. *Douglas*, 1737, M. 12,616; Elch. "Prescription," No. 12.

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Statutory nullity of deeds blank in the name of the grantee.

522. III. FILLING UP OF BLANKS.—By the Act 1696, cap. 25, it is enacted, "That for hereafter no bonds, assignations, dispositions, or other deeds be subscribed blank in the person or persons' name in whose favours they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before delivery. Certifying that all writs otherwise subscribed and delivered blank, as said is, shall be declared null." This Act applies to trust-settlements blank in the names of the trustees.[1] According to Erskine, the names of the disponees will be presumed to have been filled in before delivery, unless the contrary be proved.[2] It has been made matter of dispute whether this presumption would hold good if the name of the disponee were inserted in a different handwriting from that of the body of the deed. The case of *Donaldson* v. *Donaldson* is an authority in the negative;[3] and Professor Menzies justly observes,[4] that it would be dangerous to risk the validity of a deed on the insertion of a disponee's name by a party not designed in the testing clause.

Precautions to be taken in filling up blanks in wills.

523. In consequence of inattention to the provisions of the Statute in relation to the filling up of blanks, deeds of settlement have in several instances been defeated. In *Pentland* v. *Hare*,[5] the testator, who was in India, executed and sent home two trust-settlements in the same terms, one of them being left blank in the names of the disponees, but with instructions to his agent to complete the duplicate in the event of the perfect copy not arriving. The agent accordingly filled up the blanks as directed. The perfect deed never arrived. The duplicate, which had been filled up by the agent, was afterwards challenged as a blank deed under the Statute 1696, and the objection was sustained. In *Abernethy* v. *Forbes*,[6] the validity of a deed of entail was called in question on the ground that the name of the last substitute had been inserted outwith the presence of the testamentary witnesses. But the entail was held to be effectual in relation to all the heirs other than the party whose name had been irregularly inserted.

Blanks in settlements for charitable purposes.

524. A settlement for charitable purposes is not necessarily ineffectual by reason of the occurrence of blanks in the specification of the persons intended to be benefited, or the property or sum of money intended to be applied; these being regarded as matters of

[1] *Pentland* v. *Hare*, 22 May 1829, 7 Sh. 640.

[2] *Ruddiman* v. *Merchant Maiden Hosp.*, 1743, M. 11,462.

[3] Ersk. 3, 2, 6; *Donaldson* v. *Donaldson*, 1749, M. 9080.

[4] Menzies on Conveyancing, 3d ed. p. 131.

[5] *Pentland* v. *Hare*, 22 May 1829, 7 Sh. 646.

[6] *Abernethy* v. *Forbes*, 16 Jan. 1835, 13 Sh. 263.

detail, which may competently be left to the discretion of trustees.[1] But it would seem that a legacy of an indefinite sum to an individual would be void for uncertainty, unless it were in the nature of a recompense for services rendered, or for a rational cause.[2] An indefinite bequest may be made effectual by being conjoined with a power to trustees to fix the amount of the payment.[3]

SECTION II.

Effect of Alterations, Marginal Additions, etc.

Authenticity of wills not holograph, how far affected by alterations.

525. I. Alterations on Tested Instruments.—One of the known grounds of reduction of a deed is that the deed is "vitiated *in essentialibus*,"[4] but it is much to be desired that light and air should be admitted into this somewhat obscure corner of the law. The loss or destruction of the actual deed, or paper writing, does not put an end to the deed as the deed of the truster, for if the act is either accidental, or is done without the authority of the granter, then of course, if the contents are known, the deed may be set up by a declaratory decree in an action of proving the tenor. But now, if only a part, or a clause, or it may be a single word in a deed is destroyed or rendered illegible, whether this be the result of accident, as in the case of ink being spilt over an open page, or of design, as if a person interested in defeating an entail should erase an essential word in an irritant clause, substituting for it something unmeaning or ineffective, it cannot be doubted that on proof of such accident or fraud, and of the tenor of the deed as executed, the deed might be set up, and the beneficiaries or grantees restored to their rights by a declaratory decree. Keeping in view these illustrations, it follows that the general statement, that a will or deed is reducible when it is vitiated *in essentialibus*, is a very inaccurate and misleading proposition. There are only two cases where the affirmative of this general proposition is true:—1*st*. Where the vitiation is known to be the act of the granter of the deed, or of some one authorised by him; 2*dly*. Where it is impossible to discover when or how the vitiation took place, and then it is presumed to be

[1] *Hill* v. *Burns*, 14 April 1826, 2 W. & S. 80, affirming 3 Sh. 389, N.E. 275; *Crichton* v. *Grierson*, 25 July 1828, 3 W. & S. 329, affirming 4 Sh. 553, N.E. 561; *Mags. of Dundee* v. *Morris*, 1 May 1858, 3 Macq. 134, 154, overruling *Ewen* v. *Mags. of Montrose*, 17 Nov. 1830, 4 W. & S. 346. See *infra*, Chapter LIII. (Charitable Trusts).

[2] *Stewart* v. *Stewart*, 26 Nov. 1813, F.C.

[3] *Murray* v. *Fleming*, 1749, M. 4075; *Snodgrass* v. *Buchanan*, 1806, M. "Service of Heirs," App. No. 1.

[4] Stair, 4, 42, 19; Ersk. 3, 2, 20; Balfour's Practicks, 368.

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done by the granter of the deed after subscription. In such cases there is either a virtual revocation of the deed, real or presumed, or there is the attempt to make a new deed, which fails for want of re-attestation.

Distinction as to the effect of erasures, and of deletions which do not make the original writing illegible.

526. A broad distinction exists between erasures, or such vitiations as render the original text illegible, and deletions made in the usual way by drawing a pen-stroke across the lines, which will next be considered. Confining our attention meantime to erasures or vitiations of the first-mentioned class, the law as to these is stated in *Grant* v. *Shepherd*,[1] where an entail was cut down because the name and designation of the first heir-substitute in the destination was written on an erasure, and Lord Lyndhurst observed, "The deed being clearly improbative, no evidence can be admitted to prove when or by whom the alterations were made; and there is nothing on the face of the deed itself to show that the alterations were made before the execution. . . . The presumption of law therefore is, that they were made afterwards."[2] But to this opinion, which would seem to predicate the nullity of all conveyances vitiated in the name of a grantee, a qualification was adjected. "There is no doubt," his Lordship continued, "that a deed may be good in part and bad in part. Where there are two independent provisions, the one may be vitiated by erasure and the other may prevail, as in the case of a deed giving a legacy to A. and another to B. If the legacy to A. be vitiated by erasure, yet the legacy to B. would remain good. So also, where there is a grant of an estate with a series of substitutions, and one of the later substitutions fails by reason of an erasure, that would not affect the previous estates. This was decided in the *Balbeithan* case,[3] and, as it would seem, on the ground of those estates not being dependent on the subsequent limitation."[4] The subject is further developed in the elaborate opinion of Lord Westbury in the entail case of *Gollan* v. *Gollan*. To avoid repetition, reference is made to a subsequent chapter, where the opinion is quoted *ad longum*.[5] The name of the grantee, if he takes a beneficial interest, is *inter essentialia*.[6] The date at which an obligation is prestable is a material part of the

[1] *Grant's Trs.* v. *Shepherd*, 21 July 1847, 6 Bell, 153.

[2] 6 Bell, 171.

[3] *Abernethie* v. *Forbes*, 16 Jan. 1835, 13 Sh. 263.

[4] 6 Bell, 172. The case of *Peddie* v. *Doig's Trs.*, 1857, 19 D. 820, raised the question whether the vitiation *in essentialibus* of a codicil involved the will to which it was ancillary in the nullity. In this case the doctrine of *partial nullity* was applied, the vitiated clause being only a precept of sasine for feudalising the gift.

[5] Chapter XXVII., Section I., *infra*, citing *Gollan* v. *Gollan*, 1863, 1 M. (H.L.) 65.

[6] *Grant's Trs.* v. *Shepherd*, 21 July 1847, 6 Bell, 153, affirming 6 D. 464; *Reid* v. *Kedder*, 30 July 1840, 1 Rob. 183, affirming 13 Sh. 619.

deed;[1] so also is the sum stipulated to be paid.[2] Alterations in the testing clause are almost always destructive to the deed; as, for example, in the date of execution,[3] or, under the old law, in the statement of the number of the pages.[4] In a deed of entail, the restraining clauses are, of course, essential.[5] Passing to the consideration of vitiations or alterations of the second class, *i.e.*, such as do not render the deed in its pristine form illegible, the views of the writer, stated under judicial responsibility, are given in a condensed form in the following extract from his opinion (a final judgment) in *Patteson's Trustees* v. *University of Edinburgh*.[6] To the four propositions there developed he adheres, presuming that they relate to alterations appearing upon tested instruments.

Rules for determining the effect of deletions in wills.

"My view on this subject may be stated in four propositions, all of which appear to be necessary for the decision of the case before me:—

"(1.) If a will or codicil is found with the signature cancelled, or with lines drawn through the dispositive or other essential clause of the instrument, then, on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is held to be revoked; otherwise it is to be treated as a subsisting will. So much appears to be established by the decisions, amongst which the older decisions of the English Courts may be referred to in illustration of what I conceive to be a principle common to the systems of law of England and Scotland.[7]

"(2.) If a will or codicil is found with one or more of the legacies or particular provisions scored out, I should hold that this raises no case for inquiry as to the testator's intention to revoke the instrument in whole, but that a question is raised as to the intention to revoke the particular provision; and I should not hold the provision revoked unless upon evidence that the scoring was done by the testator himself, or by his direction, with the intention of revoking the clause.[8] If the deletion were authenticated by the testator's initials, recognisable as his handwriting, I should hold this to be sufficient proof that the deletion was the act of the testator, the full signature being only necessary to an act of positive disposition or bequest. It is hardly necessary to give reasons for denying effect to unauthenticated and unproved deletions, because to hold

[1] *Kirkwood* v. *Patrick*, 25 June 1847, 9 D. 1361; *Howie* v. *Merry*, M. "Writ," App. No. 3; 17 March 1806, 5 Pat. 101.

[2] *Lawrie* v. *Reid*, 1712, M. 12,284.

[3] *Smith* v. *Rankine*, 30 July 1840, 1 Rob. 173.

[4] *Morrison* v. *Nisbet*, 30 June 1829, 7 Sh. 810; *Gaywood* v. *M'Keand*, 19 June 1828, 6 Sh. 991; *Cassilis* v. *Kennedy*, 2 June 1831, 9 Sh. 663.

[5] *Fraser* v. *Fraser*, 11 Mar. 1854, 16 D. 863.

[6] *Patteson's Trs.*, 1888, 16 R. 73.

[7] See Chapter XXI., Section IV. (Revocation by Cancellation).

[8] Supported by *Petticrew's Trs.* v. *Pettigrew*, 1884, 12 R. 249.

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the contrary would be equivalent to saying that any one who could get access to a will might increase the interest of the residuary legatees by drawing his pen through the legacy clauses.

"(3.) If a will or codicil is found with marginal or interlineal additions, apparently in the testator's handwriting, I should not hold these to be part of the instrument, except in so far as they are authenticated by the signature or initials of the testator. My reason is, that our law does not give any effect to unsigned writings, even when holograph. This may be right or may be wrong. I think it right; but the principle is that, until the signature is adhibited, the truster is supposed not to have declared his intention to be in the terms written down. Now, I cannot see that there is, or ought to be, any difference of principle in regard to the necessity of subscription between the case of a codicil written at the end of a will or on a separate paper, and the case of a marginal or interlineal addition, which, if written after the execution of the instrument, can only receive effect as a codicil.[1] Having regard to previous decisions, I think that, in the case of marginal additions or interlineations, the authentication may be by initials, on the ground that the subscription at the end of the writing covers everything, and that the initial letters of the granter's name suffice to authenticate the new matter as part of the instrument.

"(4.) When the will or codicil contains words scored out and others inserted in their places, I think that the cancellation of the words in the original writing is conditional on the substituted words taking effect. Accordingly, if the substituted words are rejected on the ground that they are unsigned, the deletion is also to be rejected, and the will ought to be read in its original form."[2]

Erasure in trustee's name not in essentials, and does not vitiate the deed.

527. It is on the principle that vitiation of the name of a grantee affects only the estate or interest given to him that we may most satisfactorily rest the decisions sustaining deeds of trust, notwithstanding the entire destruction of the clauses of conveyance to trustees. In the earlier cases,[3] the difficulty was avoided by holding that the deletion of the name of one trustee was immaterial if there remained a sufficient conveyance in favour

[1] Compare *Jack* v. *Rennie*, where the marginal holograph alteration on a tested deed received effect because it was signed, with *Brown* v. *Maxwell's Exr.*, 1884, 11 R. 821, where effect was denied to a marginal note because it was unsigned. See also *Kirkpatrick* v. *Bedford*, 1878, 6 R. (H.L.), at p. 8, though this case is not precisely in point, because the deed itself was holograph. The marginal addition consisted of the words, "all free of legacy duty," and this was held to apply to all legacies given in the will.

[2] This point appears to have arisen for the first time in the case of *Patteson's Trs.* On the subject generally, reference is also made to *Nasmyth* v. *Hare*, 1821, 1 S. (Ap. Ca.), 65; *Horsbrugh* v. *Horsbrugh*, 1848, 10 D. 824.

[3] *Kemp* v. *Ferguson*, 1802, M. 16,949, *Earl of Traquair* v. *Henderson*, 26 June 1822, 1 Sh. 527, N.E. 485.

of the others. In *Robertson* v. *Ogilvie's Trustees*,[1]—where the names of three trustees out of a body of seven were deleted—the decision proceeded partly on this ground, and partly on the ground that the writing in which the deletion occurred was holograph. But the principle, that the beneficial interest may subsist notwithstanding the destruction of the conveyance of the legal estate, was distinctly announced in the following passage:—"In the first place, the whole beneficial interests created by the deed are left uncancelled and untouched. They remain the unequivocal expression of the granter's intentions, and form in truth the substantials of such a deed. The trust is nothing but the machinery for carrying those intentions into effect; and, so far from being essential to the support of the beneficial interests, it is well known that these interests are protected, and means taken for carrying the granter's intentions regarding them into effect, after the whole apparatus contrived by him for that effect has irrecoverably fallen to the ground. This consideration would go far to support a defence much more general than is necessary in the present case, as it affords a strong analogy in favour of the proposition that a total failure of the appointment of trustees in consequence of erasure in all the names might not be fatal to the deed."[2] This opinion received effect in a later case,[3] where a trust-disposition of heritable property, not holograph, was sustained, notwithstanding the deletion of the names of all the trust-disponees. So far, the decision is entirely consistent with and supported by the doctrine of partial nullity; the second part, however, is more doubtful. The truster had endorsed on the margin of the deed, and opposite the deletion, the words "Managers of the Royal Infirmary for the time being," and it was held that those words might receive effect as a holograph memorandum appointing the managers of the Infirmary for the time being trustees of the settlement.[4] If this addition was unsigned, the decision seems only defensible on the ground that the holograph words concerned administration only, and that the Court had the power to appoint the parties suggested.

Alterations on the text of a will, in the testator's handwriting, whether effectual.

528. II. ALTERATIONS ON HOLOGRAPH DEEDS.—The principles applicable to the alteration of tested deeds after subscription have

Holograph alterations do not affect the authenticity of a holograph will.

[1] *Robertson* v. *Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236.

[2] 7 D. 245-6, per Lord Fullerton.

[3] *Royal Infirmary of Edinburgh* v. *Lord Advocate*, 28 June 1861, 23 D. 1213. In the cases of omission to name trustees or revocation of a nomination without naming others, the machinery of adminstration is supplied by the Court; *Melville* Petr. 8 Mar. 1856, 18 D. 788.

[4] See *Kennedy* v. *Arbuthnot*, 1722, M. 1681; *Richardson* v. *Biggar*, 19 Dec. 1845, 8 D. 315, where a nomination of A., whom failing, B., to be the testator's executor, was sustained, although the word "whom" was written on an erasure.

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never been applied to holograph writings. The authenticity of a holograph deed does not depend at all on the signature of the maker; every word of a holograph or autograph will authenticates itself, and subscription is only necessary as a certificate of completed testamentary intention. In *Robertson* v. *Ogilvie's Trustees*,[1] Lord Mackenzie observed, and the observation was approved in the *Morgan* appeal,[2]—"A holograph deed depends mainly on the handwriting of the granter in which it is proved or admitted to be. Then the ordinary doctrine of erasure and superinduction cannot apply; for there is no room to say that the alteration or change was not made by the granter. On the contrary, being in his handwriting proves that it was made by him; so that it stands in the same situation as an ordinary deed when it has an express clause mentioning that the alteration was made by the granter."

Effect of memorandum written on an original deed, in the handwriting of the testator.

529. In the case of *Magistrates of Dundee* v. *Morris*,[3] the House of Lords sustained a holograph memorandum, or note, indorsed on a will, annulling what was written on the preceding pages, and declaring the granter's wish to establish an hospital in Dundee, as therein described. A portion of the clause descriptive of the foundation was deleted, including the word "hospital"; so that, unless the deleted passage were read, there was no specification of the purpose of the trust. Their Lordships sustained the memorandum; and being of opinion that the deletion of the word "hospital" was accidental, they held themselves entitled to read it for the purpose of completing the sense of the preceding passage, although, in construing the writing, they held that the deleted portion could not receive effect as a substantive provision. In a later case, *Chapman* v. *Macbean's Trustees*,[4] the Court decided in favour of the validity of a codicil which, besides being so ungrammatically expressed as to be almost unintelligible, contained a material error in the name of the legatee, partially corrected by deletion. The late Lord President, referring to the case of *Morris*, said: "If it is necessary to make sense of the deed, you must read the part of it obliterated as if it was not obliterated,—a doctrine very new to me certainly, but to which I must now subscribe."

Authentication and date of holograph additions to testamentary writings.

530. From the principle that in holograph writings each word authenticates itself, it follows that unsigned marginal additions and interlined passages in holograph writings are in general to be read as part of the will;[5] the case of deathbed, where the date of the

[1] *Robertson* v. *Ogilvie's Trs.*, 20 Dec. 1844, 7 D. 236, at p. 242.

[2] *Mags. of Dundee* v. *Morris*, *infra*.

[3] *Mags. of Dundee* v. *Morris*, 1 May 1858, 3 Macq. 134.

[4] *Chapman* v. *Macbean's Trs.*, 10 Feb. 1860, 22 D. 745. See *Adv.-Gen.* v. *Smith*, 1 March 1852, 14 D. 585 (second point).

[5] *Robertson* v. *Ogilvie's Trs.*, *supra*; *Grant* v. *Stoddart*, 27 Feb. 1849, 11 D. 860; *Kemps* v. *Ferguson*, 1802, M. 16,949; *Bruce* v. *Stewart*, 1666, 2 Br. Sup. 427.

alteration was material, being treated somewhat exceptionally;[1] other exceptions may be figured, *e.g.*, the case, which was actually presented for decision,[2] of a regular holograph will in ink, which had been altered in pencil, but the alterations were not authenticated. The natural inference was that the testator meant to use the pencilled will as a draft for a new one which he never executed; but the writer's fourth point[3]—that alterations which are rejected because they are unauthenticated do not invalidate the original will—did not come up for decision, the will being held to be revoked on another ground, viz., in respect of the marriage of the testator and the birth of a child.

SECTION III.

Codicils, and the effect of Referential Words in a Will.

531. The adoption or authentication by reference of informal testamentary writings may, according to the decisions, be either antecedent or subsequent:—(1.) A testator may, in his holograph or tested will, adopt *a previously written paper*, which may be either holograph and unsigned, or signed but not holograph, or neither holograph nor signed. The adoption, to be effectual, must be in express terms, and the writing intended to be adopted must be so described as to admit of identification.[4] (2.) A testator may declare that informal memoranda, *to be afterwards written*, shall be binding on his trustees in the same manner as if they had formed part of the settlement. As documents not yet written cannot be identified by reference, the same necessity would seem to exist for the authentication of such memoranda as in the case of any other testamentary writing. However, it was held that a testator might by anticipation give authenticity to informal memoranda, to the extent of validating a subscription by initials.[5] And by the decision in the case of *Wilsone's Trustees*[6] the rule was so far relaxed that the testator was allowed to dispense with all the statutory essentials of attestation, and his dispensation was considered to validate subsequent writings which were neither holograph nor tested. It appears to the writer that the attestation of

Adoption by anticipation: whether competent under the Authentication Statutes.

[1] *Durie* v. *Gibson*, 1667, M. 16,927; *Johnston* v. *Johnston*, 1688, M. 17,063.

[2] *Munro's Exrs.* v. *Munro*, 1890, 18 R. 122.

[3] *Supra*, pp. 285-9.

[4] *Inglis* v. *Harper*, 18 Oct. 1831, 5 W. & Sh. 785, reversing 6 Sh. 864; *Callander* v. *Callander's Trs.*, 17 Dec. 1863, 2 Macph. 291; *Baird* v. *Jaap*, *infra*.

[5] *Baird* v. *Jaap*, 15 July 1856, 18 D. 1246.

[6] *Wilsone's Trs.* v. *Stirling*, 24 D. 163; see *Rankine* v. *Reid*, 7 Feb. 1849, 11 D. 543; *Dundas* v. *Lewis*, 13 May 1807, Hume, 917, M. "Writ," App. No. 6; and compare *Melvin* v. *Nicol*, 20 May 1824, 3 Sh. 31, N.E. 21, 1 Ross' L. Ca. 432.

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a will cannot, in any reasonable sense, be held to apply to a codicil subsequently executed, and that the decisions in question are contrary to principle, and to the provisions of the Attestation Statutes.[1]

Adoption by indorsation.

532. The questions that have arisen upon the adoption or recognition of testamentary writings relate chiefly to the identification of memoranda referred to in regular testamentary writings, subsequently executed. The best mode of adopting an informal writing is by a holograph docquet on the writing itself. In *Macintyre* v. *Macfarlane's Trustees*,[2] a will, which was neither holograph nor tested, was held to be validated by the addition of a short codicil in the testator's hand, commencing with the words, "I add to this." And where a testator, by his deed of settlement, provided that bequests, to be afterwards declared, should be effectual if written, dated, and signed by himself, and he left, *inter alia*, two holograph codicils on one sheet of paper, dated at the commencement and signed at the end of the second codicil, the Court held that the testator's subscription sufficed to validate both codicils.[3]

Adoption of memoranda of date of the will by referential words.

533. When the recognition is by a separate testamentary writing, it is usual to refer to the paper by its title; and in practice it has been considered sufficient, in the case of contracts, to refer to signed plans and specifications as writings signed in relation to the contract.[4] In this manner also may a signed inventory of titles be incorporated by reference to a conveyance of property. On the same principle, where a testator appointed an executor to hold his estate, "subject to the payment of such bequests as I may instruct him to pay, in a letter signed by me of this date, to the several

[1] The case of *Wilsone's Trs.* was followed in *Young's Trs.* v. *Ross*, 3 Nov. 1864, 3 Macph. 10; while in *Crosbie* v. *Wilson*, 2 June 1865, 3 Macph. 870, an antecedent dispensation with the forms of attestation was held ineffectual to validate a codicil subscribed by mark in presence of witnesses.

[2] *Macintyre* v. *Macfarlane's Trs.*, 1 Mar. 1821, F.C.

[3] *Gillespie* v. *Donaldson's Trs.*, 22 Dec. 1831, 10 Sh. 174. See *Bryson* v. *Crawford*, 1833, 12 Sh. 39; *Hamilton* v. *Moir*, 1710, M. 17,028. By the law of England an attested codicil validates an unauthenticated will written on the same paper. In *De Bathe* v. *Lord Fingal*, 16 Ves. 167, a will was attested by only one witness; but a codicil having been appended, attested by three witnessess, in terms of the 10 Car. II., cap. 24, which was declared to be a codicil to the will thereunto annexed, the attestation was held to apply to the will. And where a will was left blank in the attestation clause, and, a fortnight afterwards, the testator appended a short codicil undated, but signed by three witnesses, the Court of Exchequer held that the attestation applied to the whole of what was written on the paper, on the ground that the codicil contained an express reference to the will. *Doe* d. *Williams* v. *Evans*, 1 Cr. & Mees. 42. In the later case of *Guest* v. *Willasey*, 2 Bing. 614, it was ruled that the execution of one of three codicils on the same sheet of paper was sufficient to validate the whole series, without words of express reference.

[4] See *Wilson* v. *Glasgow and S.-W. Ry. Co.*, 25 July 1751, 14 D. 1; *Aberdeen Ry. Co.* v. *Blaikie*, 28 Jan. 1851, 13 D. 527.

persons therein named"—the residue to go to the executor—and the testator died two days afterwards, leaving a signed letter of instructions not holograph, the House of Lords decided that the adoption of the letter in the probative will made it effectual, and they directed an issue to try the question whether the letter founded on was the one referred to in the will.[1]

Whether signature is essential in the case of a memorandum thus adopted.

534. It is not necessary that the document adopted by reference should be subscribed by the party. The testator's subscription of a document written by a different hand is not authentication; nor is his subscription necessary to denote the completion of the writing, that being fixed by the reference in the principal deed. The signature of the granter is, however, a very important element in the proof of the identity of the writing to which it is adhibited with that referred to in the will; though, of course, the identification may be established by other evidence.[2]

Recital not equivalent to adoption.

535. A mere reference *narrativé* to a previously executed writing is not equivalent to adoption. In order to give validity to an informal writing, it must appear that the reference was made for the purpose of importing that writing into the operative part of the will.[3] Allied to the cases which have been considered is the case of *Speirs*,[4] where two papers, evidently continuous, were found in an envelope in the testator's repositories, the latter part only being authenticated by the testator's initials, and the whole bearing reference to a previous regularly executed settlement. On proof that the testator (a lady) was in the habit of signing letters and documents by initials, the writings were sustained as testamentary. "The elements in the case which lead to this result are—(1) The documents purport to be a completed will; (2) They are found in a confidential repository; (3) They are in the same envelope; and (4) The second document begins with 'also,' which shows that it was intended to be read along with some previous writing."[5]

[1] *Inglis* v. *Harper*, 18 Oct. 1831, 5 W. & S. 785, reversing 6 Sh. 864; *Stewart* v. *Watson*, 1791, Bell's Oct. Ca. 225. In the English case of *Aaron* v. *Aaron*, 3 De Gex & Sm. 475, where an unattested codicil was referred to in a subsequent duly executed codicil, written on a separate paper, it was held that the former was thereby rendered effectual for the devise of real estate. A detached attested codicil, of course, will not cure the defects of a prior unattested writing *not* referred to; and a general reference to prior wills and codicils will be held to apply only to such as are regularly attested, if there are such in existence; *Croker* v. *Marquis of Hertford*, 4 Moore, P.C. Ca. 339; *Allen* v. *Maddock*, 11 Moore, P.C. Ca. 427.

[2] *Russell* v. *Freen*, 14 May 1835, 13 Sh. 752; *Gordon* v. *Anderson*, 15 Feb. 1828, 3 W. & Sh. 1. As to the sufficiency of signature *on the last sheet*, see *Mason* v. *Skinner*, 16 Jur. 422.

[3] *Boswell* v. *Boswell*, 28 Jan. 1852, 14 D. 378; *Urquhart* v. *Urquhart*, 20 Feb. 1851, 13 D. 742.

[4] *Speirs* v. *Home Speirs*, 1879, 6 R. 1359.

[5] 6 R. 1363, per Lord Moncreiff. See as an example of holograph words which were held not to amount to adoption

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Paper of instructions cannot be read for the purpose of controlling the will.

536. In the case of *Blair* v. *Blair*,[1] it was decided, after very anxious consideration, that a holograph memorandum of instructions to prepare a will leaving residue to the testator's eldest son, could not be read for the purpose of controlling the settlement itself, by the terms of which the residue was given, not to the eldest son, but to the children equally. "I think," said Lord Moncreiff, "it is most dangerous to say that a regularly executed deed shall be controlled and perverted from its legal import by reference to an unauthenticated instrument, said to contain instructions of the deceased for making a deed of settlement. Whatever were her instructions, the deed was executed by the testatrix in the terms in which it stands; and we can get her intention nowhere else but in that deed. We know not what circumstances or what considerations may have occurred between the time when the paper of instructions was written and the date of executing the deed.[2] There is, however, some authority for holding that a draft may be referred to for the purpose of correcting clerical errors.[3]

Liberal construction of codicils and deeds of alteration in relation to style and expression.

537. Although the reservation of a power to alter by any informal writing ought not to have the effect of obviating objections to the regularity of such writings in respect of execution, it will entitle them to a favourable construction in a question as to style. Independently indeed of any reserved power, deeds of alteration are so far privileged that they are binding on trustees of heritable property although informal as to style. For example, the purposes of a trust of heritable property may be declared by testament if an effectual conveyance has been made by a previous settlement,[4] The trust conveyance itself may also be revoked by a testament;[5] but in that case, if the testator, instead of engrafting new purposes on his subsisting settlement, began by revoking it, and proceeded to make a new settlement of his heritable property without using dispositive words, the new settlement (in the case of a writing

of the part of the writing which was not holograph, *Maitland's Trs.* v. *Maitland*, 1871, 10 M. 79. The case of *Brodie* v. *Muirhead*, 1870, 8 M. 461, there referred to, was a case of acknowledgment of a loan of money which concluded with a holograph docquet.

[1] *Blair* v. *Blair*, 16 Nov. 1849, 12 D. 97.

[2] 12 D. 108.

[3] *Barstow* v. *Kilvington*, 5 Ves. jun. 593; *Milner* v. *Milner*, 1 Ves. sen. 106; *Blackwood* v. *Damer*, 3 Phil. 458, note; *Castell* v. *Tag*, 1 Curt. Eccl. 298.

[4] *Ballantyne* v. *Mags. of Ayr*, 17 Jan. 1838, 16 Sh. 325; *Panton* v. *Gillies*, 22 Jan. 1824, 2 Sh. 632, N.E. 536; *Cameron* v. *Mackie*, 29 Aug. 1833, 7 W. & S. 106, affirming 9 Sh. 601. And a will may be looked to for the purpose of explaining a trust-settlement, where the two writings are parts of a connected scheme of disposition; *Campbell* v. *Campbell's Trs.*, 21 Dec. 1866, 5 Macph. 206; *Richmond's Trs.* v. *Winton*, 1864, 3 M. 95; *Bannatyne's Trs.* v. *Cunninghame*, 1869, 7 M. 993,

[5] *Willoch* v. *Ochterlony*, 1772, 3 Paton, 659, affirming M. 5539; *Brack* v. *Hogg*, 23 Nov. 1827, 6 Sh. 113; *Leith* v. *Leith*, 6 June 1848, 10 D. 1137; *Purvis' Trs.* v. *Purvis' Exrs.*, 23 Mar. 1861, 23 D. 812.

executed prior to the commencement of the Titles Act, 1868), was not effectual. The revocation was effectual, but the estate resulted to the heir-at-law.[1] The case of *Barclay* v. *Griffiths* is an example of a declaration of trust in a holograph letter being imported into a settlement of heritage.[2] A holograph alteration or declaration of purposes will bind the heritable estate, though it should at the same time revoke the appointment of trustees contained in the settlement, and thus leave the estate without a disponee.[3]

538. The question whether a document is a testamentary writing or a memorandum or paper of instructions to prepare a will is for the Court, not for a jury.[4]

Adoption of informal writings in a formal will or settlement.

539. No description of writings furnishes so many examples of the danger of neglecting the formalities of attestation as that of wills and testamentary settlements. Prior to the case of *Wilsone's Trustees*[5] there is no instance of a testamentary deed signed by the testator having been sustained which was neither holograph, tested in terms of the Statutes, nor adopted by reference in a subsequent authentic testamentary writing. In the case of *Rankine* v. *Reid*,[6] an attempt was made to support a codicil, neither tested nor holograph, upon the plea of favour to testamentary writings, but the plea was overruled. In other cases, a deed may be set up by the aid of the plea of *rei interventus;* but objections to the formality of testamentary settlements are almost always fatal.[7]

SECTION IV.

Destinations in Bonds, Title-Deeds, and Securities.

Testamentary effect of gift or destination in title to heritable estate.

540. In the category of testamentary instruments we may include destinations inserted, at the request of purchasers or lenders, in the title-deeds and proprietary certificates of heritable and moveable property and the obligatory clauses of bonds. The testamentary and revocable character of such destinations was established, with respect to heritable estates, in a case the circumstances of which were well adapted to raise the question, the case

[1] See Chapter IX., Section IV.

[2] *Barclay* v. *Griffiths*, 4 Mar. 1830, 8 Sh. 632. But see *contra*, *Stewart* v. *Baillie*, 27 Jan. 1841, 3 D. 463.

[3] *Kidd* v. *Kidd*, 9 June 1843, 5 D. 1187.

[4] *Maclean* v. *Maclean's Trs.*, 14 June 1861, 23 D. 1099; *Munro* v. *Coutts*, 1 Dow, 437.

[5] *Wilsone's Trs.* v. *Stirling*, 24 D. 163. Here the codicil was holograph of *one* of the granters only.

[6] *Rankine* v. *Reid*, 7 Feb. 1849, 11 D. 543.

[7] As to whether an informal testamentary writing may be homologated, see *Logan* v. *Logan*, 27 Feb. 1823, 2 Sh. 253, N.E. 222. See also *Macmillan* v. *Macmillan*, 28 Nov. 1850, 13 D. 187.

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so often cited of *Balvaird*.[1] James Balvaird purchased heritable property, and took from the seller a title in the name of his cousin, George Balvaird, who lived with James, and to whom James had apparently intended to make a gift of the property. James Balvaird, however, having received this title from the vendor, neither delivered it to George nor caused infeftment to be taken upon it; and on his death his widow produced a general disposition by her husband in her favour, and claimed the heritable subjects as falling within its scope. It was held that the substantial right remained in James Balvaird, and that, as the deed in favour of George was never delivered, James Balvaird retained full power over it. The general disponee was accordingly enabled successfully to claim the property, and to make up a title to it from the vendor.

Extension to case where title to stock or moveables taken in name of legatee.

541. This decision, of course, includes the case of a heritable bond; and, by an easy extension of the principle, it was held to be applicable to personal bonds and loans on the security of rates and local funds, of which the case of *Walker's Trustees* is one of the latest illustrations.[2] In that somewhat extended chapter of the law which is concerned with the construction of destinations in liferent and fee, it has long been an accepted principle that no distinction exists between destinations in wills or trusts and destinations inserted in instruments of title, as regards their construction and legal effect. In the case of *Connell's Trustees*,[3] a very important decision, in which a considerable fortune was at stake, and where all the points were elaborately argued, the doctrine of the testamentary effect of such destinations was generalised, and was extended to the cases of certificates of railway stocks, stocks of private trading companies, and in principle to assignments of moveable estate of every description, including bonds.[4] The subject is exhaustively treated in Lord Adam's opinion. Here the line was drawn, and it is thought correctly. The suggested extension of the rule to receipts for money, called deposit-receipts, although supported by the high authority of Lord Shand, is open to serious objection in principle, and is at all events negatived by a series of decisions too strong to be shaken.[5]

[1] *Balvaird* v. *Latimer*, 5 Dec. 1816, F.C.; *Hill* v. *Hill*, M. 11,580.

[2] *Walker's Trs.* v. *Walker*, 1878, 5 R. 965.

[3] *Connell's Trs.* v. *Mrs. Connell's Trs.*, 1886, 13 R. 1175. On the separate point whether the destinations were revoked by a clause in a settlement of later date, Lord Adam uses the expression that the securities in question are not testamentary writings, but this of course does not mean that their clauses of destination are not testamentary in substance and effect.

[4] The rule had already been applied to railway debentures in *Buchan* v. *Porteous*, 1879, 7 R. 211.

[5] "A document of this kind (deposit-receipt) can have no testamentary operation or effect. I think that is well settled by three consecutive cases,—those of *Cuthill* v. *Burns*, 24 D. 849; *Watt's*

Purchaser's power to revoke.

542. In all such cases, the purchaser of the subject of the security, if the security is undelivered to the nominal grantee, retains through life the control and power of disposal of the property; the case where a father had taken a title to himself as trustee for his children being treated as exceptional, on the ground that he had taken delivery in the character of a trustee.[1]

Trs. v. *Mackenzie*, 7 Macph. 930; and *Miller* v. *Miller*, 1 R. 1107. I hold it therefore as settled that a document of this kind cannot of itself operate as a will containing a bequest of money in favour of the persons in whose names it is conceived, failing the deceased." Per Lord Pr. Inglis in *Crosbie's Trs.* v. *Wright*, 1880, 7 R. at p. 826.

[1] *Gilpin* v. *Martin*, 1869, 7 M. 807.

CHAPTER XV.

RESTRAINTS ON THE TESTAMENTARY POWER.

1. Purposes, Lawful or Unlawful.
2. Perpetuities.
3. Accumulations of Income (Thellusson Act).

SECTION I.

Purposes, Lawful or Unlawful.

Unlawful purpose distinguished from unlawful condition.

543. A trust is said to be unlawful, as contravening the policy of the law, where the trust purpose is either illegal or immoral *per se*, or is coupled with a condition which the law will not enforce.[1] In the first case, the trust is altogether void; in the second case, the condition is void, but the trust purpose to which it is annexed is effectual.

544. Unlawful trusts, considered with reference to the ground of illegality, comprehend the well-known categories of *malum prohibitum* and *malum in se*. There is, moreover, a class of trust purposes which, although neither immoral in their object, nor prohibited by any positive law, are yet discountenanced on grounds of public policy; for which reason the Court will not allow its process to be used for their enforcement. The principles which regulate the legality of voluntary dispositions apply equally to testamentary settlements and to trusts *inter vivos*; and the subject may be most conveniently considered in its general relations, and without reference to the nature of the instrument creating the right.

Three classes of illegal consideration distinguished.

545. In illustration of what is meant by trusts prohibited, reference may be made to the case of *Blair* v. *Allan*, in which it was held that a direction to pay "a free liferent annuity, exempted from all burden or deduction whatsoever," was, on the assumption that it imported an obligation for payment without deduction of income tax, illegal under the Statutes 5 and 6 Vict., cap. 35, and 16 and 17 Vict., cap. 34.[2] Provisions granted to mistresses, which

[1] See Stair, 1, 12, 4. A bequest is not illegal because it is given for the endowment of ministers of the Unitarian persuasion, or other dissenting community professing doctrines different from those of the Church of Scotland; *Baptist Churches* v. *Taylor*, 17 June 1841, 3 D. 1030.

[2] *Blair* v. *Allan*, 17 Nov. 1858, 21 D. 15; *Robson* v. *M'Nish*, 2 Feb. 1861, 23 D. 429; *Wall* v. *Wall*, 15 Sim. 513, 16 L.J. Ch. 305.

are assumed to be in consideration of cohabitation,[1] or to illegitimate children *nascituri*,[2] are examples of a class of trusts which are deemed unlawful, as being granted for an immoral consideration.[3] Objections to deeds and testamentary writings on such grounds do not affect gifts contained in the same instrument which are independent of the immoral consideration or inducement.[4] Trusts by which the emoluments of a public office are appointed to be held for behoof of a party other than the incumbent, fall under the third head of the enumeration; an example of which will be found in the case of *Ord* v. *Hill*, where an agreement to hold the revenues of the office of keeper of a county Register of Sasines in trust was treated as an illegal contract.[5]

Statutory restriction of certain partnership interests.

546. In *Gordon* v. *Howden*, a reduction was brought of a latent partnership, by the trustee on the sequestrated estate of the ostensible partner, on the ground that it was illegal to enter into the business of pawnbroking (which was the object of the partnership) without advertising the names of all the partners in the manner required by the 33d section of the Act 39 and 40 Geo. III., cap. 99. The Court of Session repelled the reasons of reduction, holding that, as the Act imposed a penalty for the neglect of its provisions, it could not be held to nullify the contract. But the House of Lords reversed the judgment; and the case having been remitted back to the Court of Session, the latent partner was found to be entitled only to interest on his capital, and to a commission for management, but to have no right to a share of the profits.[6]

Statutory prohibition of latent trusts of property in British ships.

547. Under the provisions of the Navigation Laws, which were intended to prevent foreigners from acquiring interests in British shipping, no interest in shipping property could be created in favour of any other person than the registered owner; and the Courts of law held themselves precluded from enforcing latent trusts even against the person of the trustee,[7] unless, perhaps, in questions between the trustee and the creditors of the true owner.[8] The Acts now in force for the regulation of British merchant shipping[9]

[1] *Hamilton* v. *Bonamy*, 1765, M. 9471; *Durham* v. *Blackwood*, 1622, M. 9469; *A.* v. *B.*, 21 May 1816, F.C.; *Johnstone* v. *M'Kenzie's Trs.*, 4 Dec. 1835, 14 Sh. 106.

[2] *Wilkinson* v. *Wilkinson*, 1 Y. & C. Ch. Ca. 657.

[3] See Bell's Prin. § 37, where the cases are collected.

[4] *Young* v. *Johnson and Wright*, 1880, 7 R. 760.

[5] *Ord* v. *Hill*, 21 May 1847, 9 D. 1118; *Thomson* v. *Dove*, 16 Feb. 1811, F.C.; but see *Haldane* v. *De Maria*, 6 Mar. 1812, F.C.

[6] *Gordon* v. *Howden*, 28 April 1845, 4 Bell, 254, and 9 Feb. 1853, 15 D. 378; *Fraser* v. *Hill*, 17 Jan. 1852, 14 D. 335.

[7] *Calder* v. *Miller*, 12 Nov. 1824, 3 Sh. 253, N.E. 179; *Macarthurs* v. *Macbrair*, 20 June 1844, 6 D. 1174; *Ord* v. *Barton*, 3 July 1846, 8 D. 1011.

[8] *Scott* v. *Miller*, 16 Nov. 1832, 11 Sh. 21.

[9] See 17 and 18 Vict., cap. 104, § 43.

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prohibit the entry of any notice of trust, express, implied, or constructive, in the Register Book, and confer on the assignees of the registered owner a title which cannot be affected by any trust in the person of the cedent. Under the existing law, it is held that such trusts are enforcible *in personam* against the trustee,[1] though not *in rem*.[2]

Exclusion of latent trusts in deeds of co-partnery.

548. In the contracts of copartnery and deeds of settlements of English Joint Stock Companies, it is usually conditioned that the company shall not be bound to take notice of trusts in their register of transfers. The object of such regulations being to give greater facility to transactions in shares, and to relieve the company from responsibility, and such regulations being lawful in themselves, they are binding on the representatives or assignees of shareholders as well as on the original shareholders themselves.

To what extent a trust may be constituted of the interest of an heir of entail.

549. An heir of entail cannot create a trust of the fee of the estate, subject to an obligation to reconvey the estate after his death to the heirs-substitute of entail. For although a trust in those terms is not, in the words of the Statute,[3] a deed whereby the estate "may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted;" yet, as it is a contravention of the statutory prohibition against disponing, there can be no doubt that the granter of such a trust would incur an irritancy. But an heir of entail may lawfully execute a trust-disposition of his life interest in the estate and of the rents accruing during his lifetime, with a power to the trustees to enter into possession and administer the property. Such trusts are frequently executed for behoof of creditors. As they leave the feudal estate in the person of the granter unimpaired, they are not held to import a contravention of the fetters of the entail.[4]

Rents of entailed property: to what extent alienable.

550. Rents falling under the life interest of future heirs are as much *extra commercium* as the entailed estate itself; and where they are subject to a power of burdening for specified purposes, the law will not allow any deviation from the conditions of the power. Thus a power to provide younger children in three years' rent of the estate is not well executed by a bond for payment of the amount to trustees, on trust to pay the interest to children, and thereafter to invest the capital in lands; nor can a faculty of burdening the entail with provisions be delegated to trustees.[5] But it is no ob-

[1] *Boyd's Exrs.* v. *Martin's Exrs.*, 16 June 1847, 9 D. 1234. But the trust must be proved *scripto vel juramento*, *Carlyle* v. *Macalpin's Trs.*, 19 March 1864, 2 Macph. 882.

[2] See *Hay* v. *Cockburn's Trs.*, 19 July 1850, 12 D. 1298.

[3] Statute 1685, cap. 22.

[4] *Fairlie's Tr.* v. *Fairlie*, 31 Jan. 1860, 22 D. 632; *Scot. Union Ins. Co.* v. *Graham*, 19 Feb. 1839, 1 D. 532; *Boyd* v. *Boyd*, 5 July 1851, 13 D. 1302.

[5] *D. of Northumberland* v. *M'Gregor*. 28 Aug. 1846, 5 Bell, 396.

jection to the exercise of such a faculty that it is granted in satisfaction of obligations undertaken in a contract of marriage.[1]

Trusts for creating votes.

551. By the law of England, conveyances of estate for the purpose of creating votes for the election of Members of Parliament, with a private arrangement that no interest shall pass, are null and void.[2] But in Scotland the purpose of the conveyance in such cases is not so much regarded as the actual title to the property; and accordingly, although the qualification is objectionable under the provisions of the Reform Act, yet, as it is not to be presumed that the object in view was illegal, the conveyance of the property will stand good; the interest of the beneficiary being liable to be dealt with, as in other cases of latent trust, under the regulations of the Statute 1696, cap. 25.[3]

Trusts of liferent alimentary interests; in what cases effectual.

552. On the principle that the right to give or to withhold an estate implies also the power to qualify the grant with all reasonable conditions, it is held that a truster may convey to another a life interest in estate or money on such conditions that it can neither be assigned nor attached by creditors except for alimentary debts. No particular form of words is necessary to the creation of an alimentary interest.[4] But it would seem that an alimentary provision will not be protected if it is excessive;[5] and indeed it is not easy to see why and upon what principle the mere use of the term "alimentary" in a conveyance, without the interposition of a trust, should be held to deprive the beneficiary's creditors of the right to resort to diligence, or to withdraw the estate from the operation of the vesting clause in the Bankruptcy Act.[6] The addition of a resolutive clause does not seem to be material, as this (in the case of heritable property at least) amounts only to the creation of an imperfect entail, defeasible by creditors under the 43d section of the Entail Amendment Act.[7] Reference is made to the discussion of the subject of alimentary liferents in another chapter.[8]

553. According to the authorities in the law of England,[9] a

[1] *Gricrson* v. *Grierson*, 12 Dec. 1843, 6 D. 203.

[2] Lewin on Trusts, 9th ed. 109.

[3] *Lindsay* v. *Giles*, 27 Feb. 1844, 6 D. 771.

[4] 1 Bell's Com. 7th ed. 124.

[5] See, however, *Monypenny* v. *E. of Buchan*, 13 Sh. 1112, and *Harvey* v. *Calder*, 2 D. 1099.

[6] 19 and 20 Vict., cap. 79, § 102.

[7] 11 and 12 Vict., cap. 36, § 43.

[8] Chapter XXXIII., Section IV.

[9] The distinction was clearly laid down by Lord Eldon, who said (*Brandon* v. *Robinson*, 18 Ves. 429), that to exclude the assignee in bankruptcy, the estate must be given over to some one else, either expressly or by implication, *e.g.*, by a residuary destination. Words of appropriation to the maintenance of the grantee,—*e.g.*, "for his own personal maintenance and support," or "not to be liable to his debts, engagements, charges, or incumbrances," &c.—do not exclude the assignee; *Graves* v. *Dolphin*, 1 Sim. 66. Nor can his right be defeated by clothing the trustees with discretionary powers, *e.g.*, to apply the rents and profits for the maintenance of the granter's son, "at such times and in such manner

CHAPTER XV.

Trusts excluding the diligence of the beneficiary's creditors.

trust cannot be created subject to the condition that the interest of the beneficiary shall not be alienated, or shall not be made subject to the claims of creditors;[1] but the rule may be avoided by the settlement of a life interest upon the beneficiary, defeasible upon alienation, bankruptcy, or insolvency, with a limitation over to another party, in the nature of a resolutive clause, on the happening of these events.[2] But in the law of England, as in that of Scotland, a person is not allowed to settle his property on himself with a limitation of this nature.[3]

Trust in excess of granter's power of disposal.

554. A trust may, even when not open to the objection of illegality, be ineffectual on other grounds, as where an appointment is made in excess of the powers of the disponer, or where the granter disposes of property to which other parties have preferable claims. On this ground, a trust of a testator's whole moveable estate, without excepting legitim, is ineffectual to deprive his children of their legal claims, nor can a father withdraw any part of his personal property from the legitim fund by a deed *inter vivos*, qualified by a reservation, either express or latent, of the granter's liferent.[4]

as they shall think proper for his life, . . . and that said son should not have any power to sell, or mortgage, or anticipate in any way the said rents and profits;" *Green* v. *Spicer*, 1 R. & My. 395; and *Snowdon* v. *Dales*, 6 Sim. 524. As to conditions that the estate shall not be alienated, see *Bagget* v. *Meux*, 1 Coll. 138; and *re Sanderson*, 3 Jur. N.S. 809, where such conditions were held absolutely void. The only exception is a trust for the maintenance of a *married* woman; in which case, not only may the husband's rights be excluded by almost any form of popular language (2 Jarman on Wills, 5th ed. 879), but that of his creditors may also be extinguished by the aid of a direction to trustees to pay to the wife, and "not by way of anticipation" (*id.* p. 882). A trust in restraint of anticipation cannot be created for the benefit of a *femme sole*; *Barton* v. *Briscoe*, Jac. 603.

[1] See Lewin on Trusts, 9th ed. 105; 2 Jarman on Wills, 864.

[2] For example, the interest of creditors may be excluded by a direction, if the liferenter "failed in the world, to pay the produce to the separate maintenance of his wife and children;" *Lockyer* v. *Savage*, 2 Stra. 947, the ruling authority; or to pay an annuity to the grantee only, not on any account to be alienated during his life, with a proviso that "if so alienated, the said annuity shall cease;" *Dommet* v. *Bedford*, 3 Ves. 149. But in the cases of *Wilkinson* v. *Wilkinson*, G. Coop. 259, and *Lear* v. *Leggat*, 2 Sim. 479, and other cases, resolutive clauses of similar import were held to be only directed against voluntary alienation. In conformity with the opinion of English counsel, it was ruled in *Campbell's Exrx.* v. *Clinton's Trs.*, 22 June 1866, 4 Macph. 853, that a clause, resolving the beneficiary's right in case he should "do or suffer any act or thing whereby the same or any part thereof, if hereby limited absolutely, would cease to be receivable" by the beneficiary for his own use, did not take effect by the use of arrestments attaching the fund, seeing that arrestments not followed by a decree of forthcoming only suspended the right to receive the money, and did not cause it to cease.

[3] Lewin on Trusts, 9th ed. 108; Jarman on Wills, *ut supra*.

[4] *Collie* v. *Pirie's Trs.*, 22 Jan. 1851, 13 D. 506, *per curiam*. See Chapter VI. Section II. (Legitim).

Legal order of succession cannot be perpetuated.

555. It is not in the power of a heritable proprietor to perpetuate the legal order of succession in his family; for this would be to deprive the heir of the right of alienation, which is one of the most valuable incidents of property. This subject is discussed in another chapter.[1]

Unlawful condition annexed to a trust or bequest held *pro non scripto*.

556. The effect of annexing an unlawful *condition* to a trust is that the beneficiary takes the bequest without being bound by the condition.[2] Such at least is the rule in regard to testamentary settlements. But in the case of trusts intended to take effect *inter vivos*, which are granted for onerous causes, the principle of the law of contracts, under which the transaction is entirely nullified, comes into operation.[3] Again, where the *purpose* of the trust is unlawful, the principle is the same as in the case of contracts. Accordingly, the Court will neither assist the truster to recover the property,[4] nor enforce the trust in favour of the beneficiary.[5]

Court will not interfere to enforce restitution,

557. Thus, where a party, who was desirous of having his son appointed to the office of a minister in a parish church, agreed to pay an annuity of £20 a year to a rival candidate for the benefice, upon condition of his withdrawing from the contest, the Court refused to entertain an action founded on the obligation.[6] And where a party who had the right of presentation to a macership in the Court of Session entered into certain illegal stipulations in connection with an appointment to the office, it was held that, as the Court could not have enforced performance of the stipulations, the grantee's breach of contract afforded no ground for reducing the deed of presentation.[7]

unless to protect the interests of creditors.

558. Restitution will be enforced wherever the interests of third parties are affected by the transaction, as, for example, in the case of unlawful agreements in defraud of creditors;[8] and it would appear that money advanced to assist in carrying on an illegal undertaking may be recovered in an action of accounting.[9] But although a party claiming repetition in the character of a creditor may be

[1] Chapter XXVI., Section II. (Tailzied Destination).

[2] *Fraser* v. *Rose*, 18 July 1849, 11 D. 1467; and see cases relative to restraints on marriage, M. 2963 *et seq.*

[3] Stair, 1, 3, 7 & 8; Ersk. Inst. 3, 3, 85; Bell's Pr. § 49.

[4] *A.* v. *B.*, 21 May 1816, F.C. But see *Paterson* v. *Shaw*, 20 Feb. 1830, 8 Sh. 573; *Graham* v. *Pollock*, 5 Feb. 1848, 10 D. 646; and *Wilkinson* v. *Wilkinson*, 1 Y. & C. Ch. Ca. 657.

[5] *Johnston* v. *Mackenzie's Exrs.*, 4 Dec. 1835, 14 Sh. 106; *Kerr* v. *M'Dowall*, 14 Feb. 1828, 6 Sh. 546.

[6] *Maxwell* v. *Earl of Galloway*, 1775, M. 9580.

[7] *Bruce* v. *Grant*, 27 Feb. 1839, 1 D. 583; *Thomson* v. *Dove*, 16 Feb. 1811, F.C.

[8] *Arrol* v. *Montgomerie*, 24 Feb. 1826, 4 Sh. 499, N.E. 504. But see *M'Taggart's Rep.* v. *Robertson*, 25 Jan. 1834, 12 Sh. 338.

[9] *Gordon* v. *Howden*, 9 Feb. 1853, 15 D. 378. But see *contra*, *Gibson* v. *Stewart*, 3 Aug. 1840, 1 Rob. 260, reversing 12 Sh. 683.

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thus favoured, it would seem that the heir of a truster is in no more favourable a situation than the truster himself. Thus, where a lease was granted to a trustee for behoof of the truster's mistress, on which possession was enjoyed for several years, it was held, in an action of reduction by the heir, that the trust having been already fulfilled, the Court could not enforce restitution at the instance either of the granter or of his representatives.[1]

SECTION II.

PERPETUITIES.

Trust not unlawful because same object unattainable by direct conveyance.

559. The inconvenience which would arise from subjecting property held in fee-simple to conditions and restraints which might be imposed by the caprice of any of the former proprietors, has led to the recognition of the general principle (subject to a few well-marked exceptions) that qualifications upon a fee-simple estate are only binding on the heir or immediate disponee. To certain effects, however, such qualifications may be rendered effectual by vesting the property in trustees, to be held by them for such time as may be necessary for carrying out the objects of the truster, which, as a general rule, will be executed according to his intention if not inconsistent with law.[2]

Succession of estates in fee-simple incompetent except under conditions of a strict entail.

560. In conveyances of land, a succession of estates in fee is inadmissible, except under the forms and conditions of the Entail Act, 1685, cap. 22.[3] At common law, indeed, a destination to substitutes, with prohibitory clauses, was binding *inter hæredes*,[4] until the law was altered by the Entail Amendment Act.[5] Destinations with prohibitory clauses, and imperfect entails, are now indistinguishable in legal effect from simple substitutions, which give the law of the succession so long as they are allowed to stand unaltered; but are liable to be defeated by the institute or by the substitutes, any one of whom is entitled to alter the destination if the estate be vested in him in right, and even when not feudally vested.[6] The law of Scotland looks with disfavour on future and contingent fees; insomuch that a conveyance in liferent, with a fee to the children *nascituri* of the grantee, was held to vest the estate absolutely in the liferenter, subject to limitations which are well

[1] *A.* v. *B.*, 21 May 1816, F.C.

[2] *Ramsay* v. *Ramsay*, 23 Nov. 1838, 1 D. 89, per Lord Fullerton.

[3] 1685, cap. 22.

[4] *Cathcart* v. *Cathcart*, 18 July 1831, 5 W. & S. 315.

[5] 11 and 12 Vict., cap. 36, § 43.

[6] *Gordon's Trs.* v. *Harper*, 4 Dec. 1821, 1 Sh. 185, N.E. 175; *Paul* v. *Boyd's Trs.*, 22 May 1835, 13 Sh. 818; *Smith* v. *Murray*, 9 Dec. 1814, F.C.

known.[1] Perpetuities by way of liferent are now prohibited by the Entail Amendment Act, which enacts[2] that "it shall be competent to grant an estate in Scotland, limited to a liferent interest, in favour only of a party in life at the date of such grant."

Statutory restraint upon the creation of successive liferents and fiduciary interests in perpetuity.

561. While life interests in land can only be created in favour of persons *in esse*, the fee may be given to persons described in the deed, although non-existent, at its date. At common law, it would seem that liferent interests limited to several successive generations might be made effectual as real burdens,[3] and that a perpetual succession of limited interests might be made effectual by means of a trust.[4] By the Entail Amendment Act trusts, as well as liferents, are put under the same restrictions as entails with respect to duration;[5] and accordingly, any trust purpose in the nature of a substitution extending beyond the term of endurance allowed by the Act is defeasible by the beneficiary.

Substitution in moveables: to what extent effectual at common law.

562. Substitutions in moveables, when constituted by direct conveyance, are not binding *inter hæredes;* the interposition of a trust being necessary to preserve the contingent fee. According to Erskine, "a substitute in a bond has, in the common case, no stronger right than the substitute in a simple destination of a land estate; for the institute can, in the character of absolute fiar, evacuate the substitution by a deed merely gratuitous.[6] It was assumed in some of the earlier cases that substitutions in settlements of moveables were effectual in a question with the executors of the institute;[7] but it is now settled, first, that there is a presumption in favour of conditional institution in destinations of moveable property; secondly, that even where a substitution is to be implied from the terms of the destination, the substitute has no vested right, but only a *spes successionis.*"[8]

Substitutions defeasible by changing the securities.

563. The case of *M'Dowall* v. *M'Gill* illustrates the principle that unless a trust is interposed for the protection of the ulterior interests, substitutions are in general defeasible. The truster left his estate, which consisted of personal bonds and sums of money, to his daughter, with a destination-over (which the Court held to

[1] See this subject treated in Chapter XXXIII., Section II.

[2] 11 and 12 Vict., cap. 36, § 48.

[3] *Erskine* v. *Wright*, 1 March 1843, 8 D. 863.

[4] *Strathmore* v. *Strathmore's Trs.*, 23 Mar. 1831, 5 W. & S. 170, and cases there cited; *Cairnie* v. *Cairnie's Trs.*, 14 Nov. 1837, 16 Sh. 1.

[5] 11 and 12 Vict., cap. 36, § 47.

[6] Ersk. 3, 8, 44.

[7] *Campbell* v. *Campbell*, 1740, M. 14,855; *Robertson* v. *Kerr*, 1742, M. 8202; *Smith* v. *Grieve*, 1801, "Subst. and Cond. Inst." App. No. 1.

[8] *Brown* v. *Coventry*, 1792, M. 14,863; Bell, 8vo Ca. 310; *Greig* v. *Johnstone*, July 1, 1832, 6 W. & S. 406. The question of substitutions in moveables has only a theoretical interest. The case of *Kinnear*, cited p. 305, is the only case which the writer has seen in practice.

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have the force of a substitution) in favour of certain nephews and nieces. The daughter uplifted all the funds with the exception of one of the personal bonds, and laid out the money in various investments, which remained among her assets after her death. The Court held that by the operation of changing the securities the substitution was evacuated, and therefore sustained the claim of the lady's next of kin; but with respect to the sum in the bond which had *not* been uplifted (and which was payable to the settlor, "his heirs, executors, or assignees"), they held that the substitution had not been destroyed, and accordingly preferred the substitutes named in the settlement.[1]

Contingent interests in moveable estate may be protected by means of a trust.

564. There can be no question as to the possibility of constituting a system of limited interests in moveable estate by vesting the estate in trustees for the life interest of parties successively substituted. To what extent in time a moveable succession (at common law) might thus be perpetuated has never been determined. The provisions of the Thellusson Act, which are considered in the next section, are directed only against accumulations of income; and it does not appear that the law of Scotland interposed any obstacle to the perpetuation of rational trusts of the capital or fee of moveable estate.[2] In the case of the *Strathmore* entail case, Lord Brougham remarked, "In Scotland the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in being and twenty-one years, with the time of gestation beyond, permits you, in every case, to tie up property for ever and ever, as may happen in one case in England, that of the reversion being in the Crown, and in that case only. . . . Real and personal property stand on precisely the same footing in Scotland."[3] The legality of private trusts in perpetuity was finally established by the judgment of the Court of Session in the case of *Suttie's Trustees*,[4] sustaining a settlement which appropriated the revenues of heritable and moveable estate to the support of the younger

[1] *M'Dowall* v. *M'Gill*, 19 June 1847, 2 D. 1284.

[2] See 1 Bell's Com. 7th ed. 37; Pr. § 1884; *Macnair* v. *Macnair*, 1791, M. 16,210; *Cairnie* v. *Cairnie's Trs.*, 14 Nov. 1837, 16 Sh. 1; *Ireland* v. *Glass*, 18 May 1833, 11 Sh. 626; *E. Strathmore* v. *Strathmore's Trs.*, and *Suttie* v. *Suttie's Trs.*, *infra*. In *Macnair's* case the settlement was at first sustained, subject to the remark per Lord President Campbell, that the parties might afterwards set it aside, if its provisions became inextricable; and such having been found to be the result, the settlement was afterwards reduced; per Lord Cuninghame in *Suttie* v. *Suttie's Trs.*, 18 Jur. 444. In *M'Culloch* v. *M'Culloch*, reported as a note in 5 W. & S. 180, a family settlement was reduced on the ground of inextricability; and this precedent was followed in *Mason* v. *Skinner*, 6 March 1844, 16 Jur. 422.

[3] *Strathmore* v. *Strathmore's Trs.*, 5 W. & S. 193.

[4] *Suttie* v. *Suttie's Trs.*, 12 June 1846, 18 Jur. 442.

children of the granter's heirs of entail in all time coming, subject to certain powers of division to be exercised by their respective parents, and with a destination-over in default of heirs, upon trust for support of missions in India. Trusts of this nature, executed after 1st August 1848, would be cut down by the operation of sections 47 and 48 of the Entail Amendment Act if the subject of conveyance consisted of heritable estate in Scotland, and by 31 and 32 Vict., cap. 84, section 17, if of moveable estate.[1]

Entail of moveables no longer, if ever, competent.

565. The question of the validity of an entail of moveables may be considered as settled in the negative by the case of *Boyd Kinnear*. In the first stage of the question, which took the form of a special case between the institute and his father's trustees, the opinion of the Court was sought as to whether the directions in Mr. Charles Kinnear's trust-deed, to include the moveables in the entail of the estate, ought to receive effect. The Court in disposing of that case held that the trustees were bound, as directed by the truster, to include the moveable subjects in the entail; but as the proper parties interested, viz., the succeeding heirs of entail, were not parties to the proceedings, the Court refrained from expressing an opinion on the validity of an entail of moveables.[2] An entail having been executed in the prescribed form, the institute then raised a declaratory action, calling as defenders all the succeeding heirs of entail, and concluding that, as regards the moveables, the entail was inoperative and ineffectual to restrain the pursuer from altering the order of succession, selling or contracting debt, &c. The case came before Lord Shand, who in an elaborate judgment, in which all the cases and *dicta* on the subject are reviewed, determined the question in favour of the pursuer. The judgment was acquiesced in. Lord Shand distinguishes the case where "lands are conveyed with certain moveable articles, such as

[1] "From and after the passing of this Act, it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the granter, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees such trustees shall be bound to deliver, make over, or convey such estate to such party: Provided always, that where more persons than one are interested in the moveable or personal estate held by trustees as hereinbefore mentioned, all the expenses connected with the transference of a portion of such estate to any of the beneficiaries in terms of this Act shall be borne by the beneficiary in whose favour the transference is made."

[2] Special Case *Kinnear*, 1875, 2 R. 765. A similar decision was given in *M. of Bute* v. *Bute's Trs.*, 1880, 8 R. 191.

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paintings or plate, subject to the condition that if the institute or a succeeding heir should gratuitously dispose of the moveables, he should forfeit his right to the lands. . . . This would give a strong and it may be overwhelming motive against such an act, and so might indirectly secure the descent in one line of certain moveables with the heritable estate."[1]

SECTION III.

Accumulations of Income (Thellusson Act).

Trusts for accumulation effectual at common law according to their tenor.

566. At common law there does not seem to be any restraint upon the power of a settlor to direct the accumulation of the proceeds of his property, heritable or moveable, provided the purpose of the accumulation is rational, and capable of being carried into effect.[2] An accumulation in perpetuity, however, would not be tolerated; and there is authority for holding that, although the mere fact of the accumulation being for purposes indefinite and capricious may not be sufficient to stamp the trust with the character of illegality, yet, where the provisions of the settlement are *inextricable*, or where they are applicable to *too remote a contingency*, they are ineffectual at common law.[3] On this ground, a reduction, having been brought of a settlement which contemplated the accumulation of the rents of heritable property for an indefinite period, for purposes not very distinctly expressed, but intended for the ultimate benefit of the Episcopal Church of Scotland, the Court referred the matter to an accountant; and on receiving a report from him that it would not be practicable to carry into effect any of the beneficial purposes of the trust, they set aside the settlement.[4] The accumulation, it would seem, must be not only for a definite object, but also limited as to time and amount. An instance of the successful employment of the power of accumulation for the purpose of creating a fund for the support of a charitable institution, was mentioned by Lord Cuninghame in the note to his

[1] *Kinnear* v. *Kinnear*, 1877, 4 R. 705, 708. In the subsequent case of *Maclean's Trs.* v. *Maclean*, 1889, 16 R. 1095, the distinction is accentuated that a destination of pictures, family plate, and the like, is valid as a substitution, but inoperative if the substitution is defeated; and this was assumed with reference to the great collection of works of art at Hamilton Palace, which were sold notwithstanding a substitution, and with reference to which there was a suit for legacy duty, now depending on an appeal to the House of Lords. See also *Veitch* v. *Young*, 1808, M. "Service and Confirmation," App. No. 4; *Baillie* v. *Grant*, 1859, 21 D. 838, and cases cited in Lord Shand's judgment in *Kinnear's* case.

[2] Bell's Pr. § 1884, 5th ed. 1865; *Macnair*, 1791, M. 16,210; *Mason* v. *Skinner*, 6 March 1844, 16 Jur. 422.

[3] 1 Bell's Com. 7th ed. 37.

[4] *Mason* v. *Skinner*, 6 March 1844, 16 Jur. 422.

interlocutor in the case of *Ogilvie's Trustees*,[1] where he states that the fund bequeathed by John Watson for the establishment of an hospital in Edinburgh, which was originally (in 1781) only £4700, had, in 1822, accumulated to the sum of £90,000.

Accumulation of the rents of heritable estate effectual at common law.

567. Until the extension of the Thellusson Act in 1848 to settlements of heritable estate, the legality of accumulations of the rents of lands in Scotland fell to be determined with reference to the common law principle here enunciated. In the case of *Strathmore* v. *Strathmore's Trustees*, a direction to accumulate the rents of an estate for the term of thirty years, or until the death of the longest liver of two persons named in the settlement, for the purpose of investing the accumulated fund in the purchase of lands to be entailed, was found not to be reducible on the ground of irrationality; and it was observed by Lord Brougham, that although there might be good grounds for setting aside an accumulation in perpetuity, the Court was not called upon to say for what length of time the produce of lands might be permitted to accumulate.[2] In the case of *Keith's Trustees* v. *Keith*, the truster's direction was to retain the management of certain heritable estates in Scotland until the death of a party named, if she should have no children, or until the majority of her eldest surviving child, if any; and during that period to levy and accumulate the rents and profits thereof, and lay out the same, after deduction of all expenses, in the purchase of lands in Scotland, to be entailed in manner therein directed. The argument was directed to the question whether the Act 11 and 12 Vict., cap. 36, operated retrospectively, so as to vest the produce of the accumulations in the truster's heirs-at-law; and it was assumed, in consequence of the judgment in the *Strathmore* case, that the accumulation in question was not void at common law.[3]

Extension of the Thellusson Act to heritable estate in Scotland.

568. The period within which accumulations of the revenues of estate in Scotland may lawfully take place will now be determined in all cases by the provisions of the 39 and 40 Geo. III., cap. 98, as extended by the 11 and 12 Vict., cap. 36, section 41, and the Act 55 and 56 Vict., cap. 55.[4] Questions upon the construction of the

[1] 8 D. 1234.

[2] *Strathmore* v. *Strathmore's Trs.*, 23 March 1831, 5 W. & S. 170-199; affirming 8 Sh. 539.

[3] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040. *Vide infra*, §§ 573, 584.

[4] This Act having been passed so recently as 1892, no cases have as yet arisen upon its construction. The substantive clause is as follows:—1. "No person shall, after the passing of this Act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated."

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Thellusson Act[1] may be resolved into three heads:—(1) as to the nature and extent of the accumulations annulled by the Statute; (2) as to the persons to whom illegal accumulations result; (3) as to the exceptional accumulations permitted by the Statute.

Terms of the statutory restriction.

569. I. NATURE AND EXTENT OF THE STATUTORY PROHIBITION.—By the 1st section of the Statute of Geo. III., on the narrative that it is expedient that all dispositions of real or personal estates, whereby the profits or produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to restriction, it is enacted that no person or persons shall, by deed, surrender, will, codicil, or otherwise howsoever, "settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or granters, settlor or settlors; or the term of twenty-one years from the death of any such granter, settlor, devisor, or testator; or during the minority, or respective minorities, of any person or persons who shall be living, or in *ventre sa mere*, at the time of the death of such granter, devisor, or testator; or during the minority, or respective minorities only, of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated."

Statute applies to implied as well as to express directions to accumulate.

570. (1.) With regard to the question what accumulations are forbidden, it was the unanimous opinion of the judges to whom the questions in *Lord* v. *Colvin*[2] were remitted, that *implied* as well as *express* directions were prohibited. In that case the testator, Peter Cochrane, directed his trustees to divide the residue of his personal estate, and the whole accessories thereof, between his two sons (who both died without leaving issue before the conventional period of payment); and after the usual clause of survivorship, he then, in the event of their death before the arrival of the period of payment, directed the trustees to convey the said residue and whole accessories thereof to the eldest surviving son, or otherwise, to the daughters of Mrs. Moorhouse. On the expiration of twenty-one years from the death of the testator Mrs. Moorhouse was childless; and the testator's next of kin accordingly instituted a suit in the Court of Chancery, in which they claimed the annual revenues of Mr. Cochrane's personal estate subsequent to the 18th of June 1852,

[1] It should rather be called the *Anti*-Thellusson Act, as it is directed against wills such as that of Mr. Thellusson, a millionaire, who left all his money to be accumulated for the benefit of remote descendants.

[2] *Lord* v. *Colvin*, 7 Dec. 1860, 23 D. 111.

when the period of twenty-one years expired, and until the period of payment should arrive. The construction of Mr. Cochrane's settlement with reference to the provisions of the Thellusson Act having been referred to the Judges of the First Division of the Court of Session, it was argued, on behalf of the executors, that the testator had nowhere expressly directed an accumulation of the interest of the money, and could not be supposed to have contemplated the failure of all the parties who were instituted antecedently to Mrs. Moorhouse's children; and that, as the accumulation had arisen from a contingency unforeseen by the testator, and without any intention to disappoint his immediate representatives, the case did not fall within the operation of the Statute. This argument was rejected, because, in the opinion of the Court, the thing prohibited by the Statute is the actual accumulation of income in consequence of the settlement made by the testator,—distinguishing from the case of accumulation resulting from the operation of law, which may happen where the grantee is a minor or insane. "If," said Lord Deas, "the Act were to be held inapplicable wherever there was no express direction to accumulate, it would be easy in all cases to evade its operation. If it were to be held inapplicable wherever it did not appear that the testator had it in view to evade it, that also would favour evasion, by involving an inquiry into what was passing in the testator's mind, which could not be satisfactorily answered. . . . I think it enough that the deed is so conceived, that to carry out its purposes in the event which has happened, there must necessarily be accumulation for a period beyond the twenty-one years." [1]

Opinion of the Court of Chancery.

571. This decision is in accordance with the opinions expressed by the Court of Appeal in Chancery in an English case,[2] where Lord Cranworth, C., observed that the distinction taken in the Court below, between an accumulation expressed and an accumulation implied, was an unsound and impossible distinction; adding, "If a testator directs that to be done which, as a consequence, leads to an indefinite accumulation, he must, within the meaning of the Statute, be taken to have directed accumulation." [3] It may therefore be concluded, notwithstanding the fluctuations of opinion on the part of the Court of Chancery in previous cases,[4] that the Statute will in future be taken to apply to all settlements directing accumulation, whether explicity or implicitly. The operation of

[1] 23 D. 136.

[2] *Tench* v. *Cheese*, 6 De G. M. & G. 453, 24 L.J. Ch. 716.

[3] 24 L.J. Ch. 719.

[4] *Ellis* v. *Maxwell*, 3 Beav. 587, 10 L.J. Ch. 266; *Macdonald* v. *Bryce*, 2 Keen, 276, 7 L.J. Ch. 217; *Morgan* v. *Morgan*, 4 De Gex & Sm. 170, 20 L.J. Ch. 169; *Elborne* v. *Good*, 14 Sim. 165, 13 L.J. Ch. 394; *Corporation of Bridgenorth* v. *Collins*, 15 Sim. 538; *Bryan* v. *Collins*, 16 Beav. 14.

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the Statute is not excluded by the fact that the income during the permitted period has not in fact been accumulated, but has been applied to the payment of debts and provisions.[1]

Addition of simple interest to capital held to be "accumulation."

572. (2.) The prohibition is understood to embrace accumulations in every form. It will be observed that the preamble of the Statute supplies the interpretation of the word "accumulated;" for it is there used as a convertible term with the expression "whereby the beneficial enjoyment thereof is postponed." Postponement of the beneficial interest in the profits and produce of an estate being the criterion, it is obvious that the addition of accruing revenues or dividends to capital, after the period of twenty-one years, is "accumulation," whether *the interest upon such annual dividends* be also accumulated or not.[2]

Analysis of the cases.

573. In *Keith's Trustees* v. *Keith*[3] there was a conveyance by the truster, Viscount Keith, of the residue of his general estate, heritable and moveable, to trustees upon trust to invest the same in the purchase of lands, the rents of which were to be accumulated until the death of his daughter, the Countess Flahault, and again invested in lands, with power to make intermediate purchases. It was attempted to bring this case within the exception of the Statute as to Scottish heritage, on the ground that the accumulations after each purchase were the produce of lands. But it was considered that the manner of accumulation was immaterial; and as the *source* of the fund was a moveable estate, the testator's representatives could not be deprived of the beneficial enjoyment of the income for more than twenty-one years.[4] The same construction had previously been put upon the Statute with reference to a bequest of £2000 out of a general residue, which sum the testator had directed "to be invested in Government stock, and the dividends arising therefrom to be again and always invested in the funds, and to continue accumulating for a hundred years (not presuming to carry my views further)," for the purpose of founding an hospital

[1] *Campbell's Trs.* v. *Campbell*, 1891, 18 R. 992; *Colquhoun* v. *Colquhoun's Trs.*, 1892, 19 R. 946.

[2] *Shaw* v. *Rhodes*, 1 My. & Cr. 135; same case as *Evans* v. *Helier*, 5 Cl. & Fin. 114; *Campbell's Trs.* v. *Campbell*, *supra*.

[3] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040. See on this point Lord Ardmillan's note, p. 1053.

[4] This principle was followed in *Mackenzie* v. *Mackenzie's Trs.*, 1877, 4 R. 962, and *Smyth's Trs.* v. *Kinloch*, 1880, 7 R. 1176. In the last-mentioned case the testator's trustees, in the execution of their trust, and within the permitted period, purchased lands exceeding the value of the savings from the rents. After the expiration of the permitted period, the trustees had applied, and proposed to continue applying, the accruing rents in paying off the unpaid part of the price which was secured on these lands. This was held to be contrary to the Statute, but the trustees were found to have right to borrow on heritable security in order to replace the sum which had been withdrawn (by this mode of administration) from the heir.

in Dundee. In this case the trustees had a power of sale, which it was necessary to exercise in order to realise the £2000, which Lord President Boyle said was the "nest-egg" of the intended accumulations. These were accordingly held to be proceeds of moveable estate, and therefore subject to the restriction introduced by the Statute.[1]

Whether application of income in paying premiums of life assurance is accumulation.

574. An interesting question on the possibility of indirect accumulations was raised for the first time in the Court of Session by the case of *Cathcart's Trustees*,[2] where the testatrix, after directing that during the lifetime of Sir John A. Cathcart, her nephew, the entire income of her trust-estate, heritable and moveable, should be accumulated, added, "with power, if they see cause, to make insurances on the life of the said Sir John A. Cathcart, in name and for behoof of the said trustees, in such a way as to enable the said trustees to receive a sum or sums at his death, to be then applied for the purposes of this trust." In pursuance of this direction, the trustees effected insurances on the life of Sir John Cathcart to the extent of £25,000; and the insured having survived the testatrix for nearly thirty-eight years, a large part of the income of the trust during that time was applied annually in payment of the premiums. The Lord Ordinary[3] was of opinion that this was a case of indirect accumulation, distinguishing this from the case where a testator has himself insured the life of a debtor, and has directed his executors to continue the payment of the premiums during the currency of the policy, which, according to the decisions of the Court of Chancery, is not accumulation, but fair performance of a continuing contract. In the Inner House, Lord Moncreiff (with whom Lord Young concurred) took a different view, which is thus summarised in the concluding sentences of his Lordship's opinion:[4]—"These premiums were not accumulated, they were expended. They were parted with as the stipulated price of a future contingent benefit, and therefore could not be accumulated. . . The sum ultimately recovered did not, in any judicial sense, represent the payments made. It was a commercial transaction—a purchase, the price of which was payable by instalments; and no accumulation took place, or was possible, during the whole course of it." Lord Craighill dissented. Lord Rutherfurd Clark said that, if he were to decide according to his own impression, he should be disposed to hold "that the power to apply the income in taking out or maintaining policies of insurance fell with the direction (to accumulate the income), of which it was a mere

[1] *Ogilvie's Trs.* v. *Kirk-Sess. of Dundee*, 18 July 1846, 8 D. 1230.

[2] *Cathcart's Trs.* v. *Heneage's Trs.*, 1883, 10 R. 1205.

[3] (Lord M'Laren.)

[4] 10 R. at p. 1216.

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accessory."[1] But in deference to the English authorities, and the view of his colleagues, he concurred in the decision. It thus appears that of the five judges who considered the case only two were convinced that the Statute could be defeated by the device of assigning the rents to an insurance company under a contract to receive their actuarial value at a period determined by death.

Period during which accumulations are permitted by the Statute: computation of time.

575. (3.) The period within which accumulations may lawfully take place cannot be extended by any act of the testator beyond the expiration of twenty-one years from his own death, or from the birth of a child then *in utero*. Accordingly, the accumulated fund falls to be paid over at the commencement of the twenty-second year, reckoned from the testator's death, and not from the date when accumulation commenced;[2] and the period is to be reckoned exclusive of the day of the testator's death.[3] The different periods mentioned in the Act are alternative, not cumulative. None of them exceeds twenty-one years; and the object of the enumeration evidently was to exclude the supposition that any of the cases of minority were to be regarded as exceptional. It may happen, however, that the donee who is to take the accumulated sum on the expiration of the statutory period is then an infant; and in that event, it has been said, a further vicennial accumulation may take place. Nay more, supposing the death of the donee to take place during minority, his legal representative may again be a minor; and thus, by a series of improbable contingencies, the capital may be tied up for an indefinite period. But this is not "accumulation." For, on the elapse of the first vicennial period, the donee, although a minor or incapable, takes a vested interest in the annual revenue, which must be applied, so far as needful, towards his maintenance; and in accumulating the surplus the Court only exercises a discretionary power of doing what the minor might himself have done had he been *sui juris*.[4]

Where vested interest given, but enjoyment postponed, held accumulation.

576. It is clear, from the words of the Statute, that the period of distribution cannot be further postponed by giving merely a vested interest to the beneficiary without the right to demand payment of the income; for the beneficiary would be entitled to payment, as being the person who "would have been entitled thereto if such accumulation had not been directed."[5]

577. (4.) The Act does not directly annul any bequest con-

[1] 10 R. at p. 1220.

[2] *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1057, per Lord Colonsay. The Court found that the accumulations were null "from and after the period of twenty-one years from the death of Lord Keith" (p. 1071). See also *Attor.-Gen.* v. *Poulden*, 3 Hare, 555.

[3] See *Lord* v. *Colvin*, 23 D. 111, where it is so computed.

[4] *Lord* v. *Colvin*, 23 D. 127, per Lord Ivory.

[5] 39 and 40 Geo. III., cap. 98, § 1.

nected with a direction to accumulate contrary to its provisions, but merely operates a transference of the intermediate rents and produce. It follows, therefore, that the trustees ought to retain the estate or capital (increased by previous lawful accumulations) during the period prescribed by the testator, paying over to the statutory appointee the annual rents and produce after the twenty-first year as they arise.[1] However, in the *Dundee* case, where there was no beneficiary to take the accumulations but the foundation, the Court held that the kirk-session might take the bequest free from the obligation to accumulate.[2]

Act does not accelerate the period of division of the capital.

578. II. WHO ARE ENTITLED TO THE PROCEEDS OF ILLEGAL ACCUMULATION.—The Statute has provided that "the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to, and be received by, such person or persons as would have been entitled thereto if such accumulation had not been directed."[3]

Terms of the enactment.

579. The expression selected by the author of the enactment is so general, that it can scarcely be said to convey any distinct impression as to the disposal of the resulting interest. The first general rule is, that unless an intention is expressed of separating the income from the capital, the income shall be held to follow the capital as an accessory, and shall be payable to the legatee termly as it accrues. By this principle the testator's intention is ascertainable in one particular case, namely, where the beneficiary interest vests before the expiration of the period of permitted accumulation. Thus, if the direction were to accumulate for a time certain, or instantly ascertainable by reference to an event, and then to convey to A. B. and his heirs, the annual revenue would of course be payable to A. B., or to his representatives for the time being. Under this principle, where the purpose of accumulation was to provide a fund for the purchase of lands to be settled on a series of heirs in strict entail, the institute was found entitled to the income set free by the operation of the Statute.[4] And where the accumulated fund was destined to the endowment of existing charities, the charitable institutions successfully claimed the accumulations.[5] The rule was thus stated by Lord Moncreiff: "If the fund directed to be accumulated is not the subject of any present gift, then the right of the eventual beneficiary will not be acceler-

How far the disposal of surplus accumulations is *questio voluntatis*.

Surplus accumulations in general follow the capital.

[1] *Green* v. *Gascoyne*, 34 L.J. Ch. 268, decided by Lord Westbury, Ch.

[2] *Ogilvie* v. *Kirk-Sess. of Dundee*, 18 July 1846, 8 D. 1243, per Lord Fullerton.

[3] 39 and 40 Geo. III., cap. 98, § 1.

[4] *Mackenzie* v. *Mackenzie's Trs.*, 1877, 4 R. 962; *Smyth's Trs.* v. *Kinloch*, 1880, 7 R. 1176; *Cathcart's Trs.* v. *Heneage's Trs.*, 1883, 10 R. 1205.

[5] *Maxwell's Trs.* v. *Stirling Maxwell*, 1877, 5 R. 248; *Ogilvie* v. *Kirk-Session of Dundee*, 1846, 8 D. 1229.

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ated or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession. But if there be a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then the burden will terminate at the expiration of twenty-one years, and the gift will become absolute in the person of the donee."[1]

In what cases accumulations result to the heir or next of kin.

580. The second rule (first in order in the preceding quotation) is illustrated by the case of *Lord* v. *Colvin*,[2] where, it being established that the vesting was contingent on circumstances which did not emerge until after the expiration of the period of permitted accumulation, the income subsequently accruing was adjudged to belong to the heirs *in mobilibus* of the testator, or rather to the representative of those heirs at the time when the claim was made, rejecting a claim for those who at that time were nearest in kin to the testator. The difficulties which have arisen as to the possible acceleration of the vesting in this class of cases may be considered as set at rest by the decision of the House of Lords in the case of *Muirhead*,[3] to the effect that where vesting is suspended during the lifetime of an annuitant or beneficiary liferenter, the surrender of the life interest to the purposes of the will does not entitle the persons apparently entitled to the capital and income to anticipated payment, except in the case of a gift to a class and the survivors, where all the individuals composing the class concur in demanding an immediate distribution. This principle was applied in a case where a testator provided for his wife by giving her a fixed annuity, and directed the accumulation of the surplus income for the benefit of certain religious endowments, the surplus income after the expiration of twenty-one years being held to belong to the testator's next of kin.[4] But where the accumulation was directed to go on, not for a definite time, but until a certain sum should be raised, and by the operation of the Statute it became certain that the prescribed sum never could be raised, it was held that the heir out of whose estate the fund was to be raised was entitled, on the expiration of the period of permitted accumulation, to take the revenue of the estate discharged of the condition.[5]

Where the capital is not vested, surplus accumulations result to the heir-at-law.

581. Where the instrument directing the accumulation contained a residuary clause sufficient to carry the undisposed-of income set free by the Statute, but where (in consequence of the destination of the residue being contingent on survivorship) the

[1] 5 R. 250.

[2] *Lord* v. *Colvin*, 23 D. 131, per Lord Curriehill, and sequel in 3 M. 1083; *Combe* v. *Hughes*, 34 L.J. Ch. 344, decided by the L. J. J. affirming a decree of Lord Romilly, M.R.

[3] *Muirhead* v. *Muirhead*, 1890, 17 R. (H.L.) 45; reversing 15 R. 254.

[4] *Elder's Trs.* v. *Free Church of Scotland*, 1892, 20 R. 2.

[5] *Colquhoun's Trs.* v. *Colquhoun*, 1892, 19 R. 946.

persons entitled could not be ascertained, the surplus income was held to belong, not to the residuary legatees, but to the legal representatives.[1]

Statutory exception as to raising portions for children.

582. III. WHAT ACCUMULATIONS ARE EXCEPTED UNDER THE STATUTE.—The 2d section of the Act declares, "That nothing in this Act contained shall extend to any provision for payment of debts of any granter, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any granter, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed." And by section 3d it is declared, "That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland."[2] But this section was repealed by the Entail Amendment Act, section 41,[3] which recites the 3d section of the Thellusson Act, and on the narrative that "it is expedient that the provisions of the said Act (39 and 40 Geo. III.) should be extended to heritable property in Scotland," enacts, "That the said provision and enactment of the said recited Act shall be and the same is hereby repealed, and the said Act shall in future apply to heritable property in Scotland." As to the disposal of the accumulated proceeds of property or funds subject to the trusts of a deed directing the execution of an entail, reference is made to a subsequent chapter relating to the execution of such trusts.[4]

Tendency of the cases as to accumulation for raising portions for children.

583. In the absence of native authority[5] on the construction of the 2d section of the original Act, it may be sufficient merely to mention the points that have been decided in the English Courts. By *children* are to be understood *legitimate* children generally of the granter; or children *specially* named of some other person taking an interest under the will. And such interest must be substantial, not elusory; but if substantial, it is no objection that it is not an interest in the particular fund which is made the subject of accumulation. Finally, it is held that the portions referred to are

[1] *Pursell* v. *Elder*, 24 March 1865, 3 Macph. (H.L.) 59, 4 Macq. 992, altering 19 D. 71.

[2] The language of this section makes it clear that the exception includes heritable estate directed to be sold, the principle of constructive conversion being inapplicable; *Cathcart's Trs.* v. *Heneage's Trs.*, 1883, 10 R. 1205, 3d point, see p. 1212.

[3] 11 and 12 Vict., cap. 36, § 41.

[4] Chapter LVI., Section II.

[5] There is one Scotch case—*Suttie* v. *Suttie's Trs.*, 12 June 1846, 18 Jur. 442—where a perpetual trust for raising provisions for younger children was sustained.

portions raised *out of the revenues*, not by adding the revenues to the capital. The cases are referred to in Mr. Lewin's treatise.[1]

Exception as to rents of entailed property in Scotland.

584. The case of *Keith's Trustees* determined that the 41st section of the Entail Amendment Act had no application to trusts in existence prior to that Act; so that the rents of heritable property might be the subject of continued accumulation under a pre-existing trust which had been already in operation for more than twenty-one years.[2]

[1] Lewin on Trusts, 9th ed. 94.

[2] *Keith's Trs.* v. *Keith;* see Lord Colonsay's opinion, 19 D. 1058; *M'Laverty* v. *M'Laverty*, 23 Jan. 1864, 2 Macph. 489.

CHAPTER XVI.

INTERESTS ARISING BY IMPLICATION.

1. Implication from Recitals.
2. Implication from Destinations to other Legatees, taking effect on a Contingency.
3. Implication from Gift of Income, where Capital is unappropriated.
4. Implications from Powers of Appointment.
5. Implied Gift of Accessory Rights.

585. Gifts by Implication (in the sense in which the term is here used) are not easily brought within the scope of a general definition; yet there is undoubtedly a clear distinction betwixt the implication of a gift, where there is no formal disposition of the subject or interest, and the construction of a clause in a testamentary writing, which is in form a disposition or bequest of some kind, though admitting of different views being taken as to its meaning. The cases are not very numerous in which interests have been held to arise by implication, *i.e.*, without the use of words of bequest or disposition. Without aiming at a formal division of the subject, these may be classed under the heads noted above. Definition of a gift by implication.

SECTION I.

Implication from Recitals.

586. Where a testator, under the erroneous supposition that he has bequeathed a certain subject or interest, either by another will or by other provisions of the same will,[1] refers to that bequest as an accomplished fact, and proceeds upon the assurance of it to make other dispositions having relation to the supposed legacy or legatee—such a recital, introduced as an element of a scheme of disposition, is equivalent to a bequest, and is effectual according to the implied will of the testator. This proposition is established by the case of *Grant* v. *Grant*,[2] where the point was raised very Recital of supposed previous bequest.

[1] In this respect, as in many others, the construction of wills is different from that of deeds or contracts. In the construction of these, recitals can have no substantive operation, but are only available in explanation of what is obscure in the operative part of the instrument; per Lord Brougham in *Mackenzie's Trs.* v. *A. Mackenzie's Trs.*, 5 W. & S. 803.

[2] *Grant* v. *Grant*, 1 March 1851, 13 D. 805; reported on another point, 8 D. 1077.

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Case of a grant supposed to be made by a previous will.

purely. The recital was contained in a codicil or deed of alteration of a trust-settlement in these terms: "I, A. S., &c., considering that by my deed of settlement I bequeath to my nephew J. G. *a sum of money, considered equal to the value of the heritable property left to his brother A. G.*, and also the free residue of my estate; that since the said deed was executed my means have accumulated considerably, and the value of landed property has suffered and is likely to suffer depreciation; I hereby recal the bequest of the whole free residue of my estate, . . . and will and appoint that after payment of all my debts, and the specific legacies enumerated in my deed of settlement, the free residue, &c. . . . shall be paid and delivered to my said nephews, J. G. and A. G., in equal shares." None of the deeds previously executed by the truster contained any bequest in favour of J. G. of a sum of money equal to the value of the heritable estate given to his brother; but it was held that the recital constituted an implied bequest of a legacy of that value, payable to the legatee preferably and in addition to his share of the residue. So where a trustee conveyed his estate to trustees for testamentary purposes, and *inter alia* for payment to his wife of the annuity provided to her in their marriage-contract (as he said) of £150, and the annuity provided by the marriage-contract was only £100, it was held that the lady was entitled to an annuity of £150. "The collocation of this clause, in which he mentions the annuity to his widow, clearly showing it to be in the region not of debt but of gift, I think the intention of the testator was to confer a bounty, and not merely to discharge an antecedent liability."[1]

Supposed grant in the same instrument.

587. In the case next considered, the gift was implied from the recital of a grant erroneously assumed to be made by the same instrument.[2] The granter, in his marriage-contract, after making sundry special provisions, proceeded as follows: "Moreover, the said W. J. hereby assigns, conveys, and dispones his whole subjects, heritable and moveable, *generally and particularly before described*, pertaining, or that shall pertain, or be addebted to him at the time of his death, to and in favour of" the children of the marriage. There was no antecedent general conveyance or description of the heritable and moveable estate, and the particular description embraced only a small part of the heritable estate of which the granter died possessed. The clause was held to amount to a gift by implication of the residue of the estates, heritable and moveable, in favour of the children of the marriage.

588. Where the erroneous recital is a mere misdescription of

[1] *Forbes' Trs.* v. *Forbes*, 1893, 20 R. 248, see p. 251, per the Lord President.

[2] *M'Gowan* v. *Jaffray*, 20 July 1842, 4 D. 1546.

a legacy actually given by a previous will—*e.g.*, where the testator recites that he has given a legacy to a person mentioned by name, while in the actual legacy this person is not mentioned by name, but is included in a gift to a class, this is held to be a descriptive error, and it does not entitle the legatee to claim two bequests of the same sum.[1] A testamentary disposition bearing reference to a prior will, and incorporating its provisions, is not invalidated, by reason of its inaccurate description of that will or reference to it, if the instrument is otherwise sufficiently identified.[2]

Distinction in case of a mere misdescription of an actual bequest.

589. The mere recital of a purpose or intention to make a particular provision, although not followed by any actual grant or bequest in the dispositive part of the will, has in some cases been considered equivalent to an implied trust imposed upon the disponee, of which we have an instance in *Mearns* v. *Mearns*.[3] The testator, "for an liferent and provision *to the said* M. L. *and my four children*," disponed and assigned certain estate "in favour of *the said* M. L., with and under the provisions and conditions underwritten." It was found that the four children were entitled to the fee of the estate in equal shares in severalty. And where a testator conveyed the *universitas* of his estate to trustees, declaring that they should be accountable to his residuary legatees thereinafter named, and the will contained no proper residuary clause, but indicated an intention that the surplus estate should be divided amongst the general legatees in the proportion of their legacies, it was held that the residue was given to them by implication.[4] *In dubio*, a wish will be understood to denote a present testamentary intention, rather than a declaration of what the testator intends to do at some future time, or in some event different from that which has happened.[5] One of the examples mentioned by Jarman,[6] of a gift implied from the declaration of a trust purpose, is the case of a testator expressing an intention to make up a person's portion or fortune to a certain amount, in which case, if he gives an inadequate sum, the legatee is, notwithstanding, entitled to the full sum requisite to raise his fortune to the specified amount. Thus, in *Ouseley* v. *Anstruther*,[7] a testator, on the narrative that under his settlement his wife would have an income of £1560, directed his trustees to add an annuity of £440, so as to raise his wife's jointure

Effect of recital of intention not followed by an express gift.

Effect of discrepancies between recital of intended gift and the gift itself.

[1] *Mackenzie* v. *Bradbury*, 34 L.J. Ch. 627, decided by Lord Romilly, M.R., on the authority of *Dashwood* v. *Peyton*, 18 Ves. 27.

[2] *Grant's Trs.* v. *Grant*, 2 July 1862, 24 D. 1211.

[3] *Mearns* v. *Mearns*, 1775, M. 13,050.

[4] *Scoular's Exrs.* v. *Scoular* (First Division), 5 Nov. 1867; not reported.

[5] *Bannerman* v. *Bannerman*, 1801, Hume, 130; *D. of Queensberry* v. *Douglas*, 30 April 1783, 2 Pat. 603.

[6] 1 Jarman on Wills, 5th ed. 495.

[7] *Ouseley* v. *Anstruther*, 10 Beav. 459. In the converse case, of the income being greater than the testator supposed, his widow would have been entitled only to the £2000.

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to £2000. The income under the settlement being less than was supposed, the wife was nevertheless held entitled to have it made up to the specified sum of £2000.

Erroneous description of estate as the property of A. not equivalent to a gift in favour of A.

590. From the cases in which a testator expresses, by way of recital, a *testamentary purpose* (whether past or present) in favour of a particular person, we must carefully distinguish those in which estate belonging to the testator is described in the will as the property of another, upon the erroneous supposition that this person has a right to it, not from the testator himself, but upon an independent title. In such cases it is evident that the description of the subject as the property of another person can never constitute an implied bequest in favour of that person; for there is no reason to suppose that the testator would have given the subject to him, had he known that it belonged to himself.[1]

Implication only takes effect for the purpose of conferring a benefit.

591. Implication, as here defined, is always invoked for the benefit of a legatee, and not for the purpose of introducing into the gift conditions which are not expressed in it. This principle is consistently carried out in the notable case of *Bryce's Trustees*,[2] in which a very large number of claimants appeared. The testator directed his trustees to pay the residue of his estate to the extent of £500 to a niece, "and the balance thereof, above £500, to and among the above-named legatees and annuitants in proportion to the amounts of their respective legacies. In the construction of these words the Court rejected the argument from supposed implication that the special provision of £500 was given to the niece in place of a share of the residue, and held that she was entitled to both; and in applying the direction to other legatees and annuitants it was held (2) that where a bequest was given to a married woman for her separate use she was entitled to have the share of residue in terms exclusive of the husband's rights; and (3) that an alimentary annuitant was entitled to a share of residue proportional to the capitalised value of her annuity in cash, and was not bound to accept it in the form of an addition to her annuity. This principle is also illustrated in the case of *Vans Dunlop's Trust*,[3] where a testator in his principal settlement (eighth purpose) left a legacy of £18,000 to his nephew, which by a codicil he reduced to £16,000. By a later codicil he provided, "In addition to the legacy or legacies left to my nephew in the eighth purpose of my trust-disposition and settlement, which was executed by me in February last, I hereby leave him £2000 sterling, if my estate can afford it." The decision was that by this reference to his original settlement the testator had restored the legacy there given to its original

[1] 1 Jarman, 491, and cases there cited.
[2] Sp. Ca. *Bryce's Trs.*, 1878, 5 R. 722.
[3] *Best* v. *University of Edinburgh*, 1889, 8 R. 66.

amount, and had made a further gift of £2000, being in all £20,000.

Implication of survivance.

592. The case of *Russell's Trustees*[1] exemplifies the equitable operation of the principle of implication in a somewhat different form. In a contract of marriage the husband made certain provisions for his intended spouse, to take effect "if she shall survive him"; in the conveyance by the wife to the husband of all the estate of which she should die possessed, the condition "if he shall survive her" was not expressed. In a question with the husband's heirs it was held,—partly by implication from the expressed condition regarding the husband's estate, and partly because the contract could not be construed as giving heirs a right preferable to that of the spouses,—that the gift of the wife's estate was contingent on the husband's survivance of the wife.

Implication in direct conveyances.

593. How far the principle of implication from recitals is applicable to gifts by direct conveyance to a grantee it is not easy in the present state of the authorities to determine. In *Chancellor* v. *Mossman*,[2] the narrative clause set forth the intention of the granters that their heritable property should, after their decease, belong to a niece for her life, and to the niece's two daughters in fee; but in the dispositive clause the subjects were disposed to the three ladies, and the survivors or survivor of them. It was held that the dispositive clause could not be controlled by the narrative to the effect of reducing the conveyance to a trust for the mother in liferent and the daughters in fee. But having regard to the recent decision of the House of Lords in the case of *Orr's Trustees*,[3] it is quite possible that the principle of implication from recitals may be extended so as to include gratuitous conveyances by way of direct disposition, as well as legacies and gifts conferred through the medium of a trust.

Gift by implication distinguished from precatory bequest.

594. In the cases which have been cited the implication is purely inferential, being founded on modes of expression which are not capable of signifying a present testamentary purpose. There is, however, a class of cases, generally referred to the principle of implied will, in which a present purpose or intention is sufficiently expressed, but the doubt is, whether the purpose be strictly testamentary, as in the class of the so-called precatory bequests, where a wish or request addressed to a liferenter or trustee is interpreted as a will.[4] Allied to cases of this class is a decision to the effect that a direction to trustees to keep in repair the mansion-house which the truster was in course of erecting, implied a power to

[1] *Russell's Trs.*, 1887, 14 R. 899.

[2] *Chancellor* v. *Mossman*, 1872, 10 M. 997.

[3] *Orr* v. *Mitchell*, 1893, 20 R. (H.L.) 27.

[4] Chapter XVIII. Section III.

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complete the house at the expense of the trust, in order to the fulfilment of a further direction to give the liferent use of it to her residuary legatee.[1]

SECTION II.

Implication from Destination to other Legatees taking Effect on a Contingency.

Bequests contingent on death of A. without issue, or in minority.

595. The most characteristic example is that of a legacy given to take effect upon the death of a certain person, or upon the death of a person without issue or in minority. In the case first put, a strong presumption arises that the person, on the event of whose death the legacy is contingent, was intended to take a liferent; and in the other case, that, in the alternative events, the person attaining majority, or the issue of the person dying leaving issue, are intended to take vested interests. So where a testator directs a distribution of the life interest and the fee of his estates amongst his children and grandchildren, and failing them to charities, but does not provide for all the contingencies, his will is to be extended by implication, rather than that the gift to his own family should fail.[2]

Whether bequest on the death of A. implies a gift of the liferent to A.

596. It does not appear that any case has yet arisen in the Courts of Scotland raising the question whether a gift of the life interest may be implied from a direction to dispose of the estate after the death of a certain person. In the law of England a distinction has been recognised in relation to real estate, which seems to be well founded. In the case of a devise to a person other than the heir, payable at the death of A., it is held that a gift of the life interest cannot be implied, because the heir is entitled to the undisposed-of succession, and it cannot be known that the testator did not intend the rents to go to the heir during A.'s life. But a devise to the heir himself, on the death of A., will confer on A. an estate for life by implication; because the testator cannot, without gross absurdity, be supposed to mean to devise estate to his heir at the death of another person, and yet that the heir should have it in the meantime, which would render the devise nugatory.[3] In relation to personal estate, the resulting rights of the personal representatives do not appear to be so much considered in the decision of such cases, and the leaning in favour of a gift by implication is stronger. The

[1] *Brotchie* v. *Stewart*, 1869, 7 M. 1031.

[2] *Aberdein's Trs.* v. *Aberdein*, 1870, 8 M. 750.

[3] 1 Jarman on Wills, 5th ed. 499. The observations of Lord Westbury in *Pursell* v. *Elder*, 3 M. (H.L.) 67, recognise the doctrine, although the circumstances of the case did not admit of its application. See §§ 600, 605, *infra*.

whole doctrine in relation to this subject was reviewed in the case of *Humphreys* v. *Humphreys*,[1] where a testator, after giving certain legacies and annuities, directed that, after the death of his wife, the remainder of his property (consisting of personal estate) should be equally divided among his brothers and sisters, if living; if dead, among his nephews and nieces. Vice-Chancellor Stuart held that the reason of the rule laid down by Mr. Jarman applied to dispositions of personal estate, and decided that the widow took a life estate by implication.

Gift on death of A. without issue: whether A.'s issue take by implication.

597. The case of a destination-over, in the event of A. (the institute or primary legatee) dying without leaving issue, involves two questions; *first*, where such a destination is preceded by a gift to the heirs of A. (*i.e.*, to A. and his heirs), whether the gift is to be held to be restricted by the subsequent words to issue or heirs of the body; *secondly*, where there is no antecedent gift to heirs or children, whether a gift to the children or issue of A. is to be implied. The first of these is the case of *M'Ewan* v. *Pattison*,[2] which is elsewhere discussed.[3] The second question, it will be observed, can only arise in very exceptional cases; for, wherever the parents are instituted to the fee, the right of the children will depend on the application of the *conditio si sine liberis*. Two cases, however, have occurred in modern times, where, the right of the parent being limited to a liferent, the fee was given over to strangers in the event of the death of the parent without leaving issue; and in both cases it was held that a right of fee was conferred by implication on the surviving children.[4] But in a case of somewhat ancient date, where a proprietor, in his contract of marriage, bound himself to tailzie his estate, failing heirs-male of the marriage, to certain persons therein named, it was held that this implied no obligation to provide the estate in favour of heirs-male, *quia positus in conditione non censetur positus in institutione*.[5]

598. In the case of a destination contingent on the death of

[1] *Humphreys* v. *Humphreys*, Law Rep. 4 Eq. Ca. 475. The cases cited by the V.-C. as ruling authorities are *Roe* v. *Summerset*, 5 Burr. 2608, and *Bird* v. *Hunsden*, 2 Sw. 342.

[2] *M'Ewan* v. *Pattison*, 27 March 1865, 3 Macph. 779.

[3] Chapter XXIV., Section III.

[4] *Douglas* v. *Douglas*, 21 Dec. 1843, 6 D. 318, where an annuity was given to a parent, and the reserved fund, "in the event of his decease without lawful issue," to the testatrix's next of kin; *Campbell* v. *Campbell*, 2 Dec. 1852, 15 D. 173, where estate was settled on the truster's daughter, in terms which were held to import only a life interest, and "failing her by decease, and without leaving lawful issue of her body," the fee was given over to the other daughters in succession. See also *Sutherland* v. *Douglas' Trs.*, 29 Nov. 1865, 4 Macph. 105. In England the tendency is to hold that the institute takes a vested interest *a morte testatoris*, subject to be divested in case of his dying without issue; *Dowling* v. *Dowling*, Law Rep. 1 Ch. Ap. 612.

[5] *Dundas* v. *Dundas*, 1706, M. 14,901, 4089; see the interlocutor. M. 4093.

Gift on death of A. in minority: whether A. takes by implication.

another person in minority, the implication of a gift to that person in the event of his attaining majority is very obvious; but the case, so far as we are aware, has not arisen in our Courts.[1]

Examples of implication from conditional gift over.

599. Several cases of implication arising upon conditional destinations are reported in the Dictionary, which may generally be referred to the category of *casus improvisus* falling within the scope of the provision. In *Wedderburn* v. *Scrimgeour*,[2] a testator, thinking his wife was with child, bequeathed certain moveable estate to his son, in the event of a male child being born; but in the event of the child being a female (in which case probably his existing son would have a larger share of the heritage), he gave 5000 merks, part of the above fund, to a stranger legatee. No child having been born, the legacy was notwithstanding held effectual, on the ground that the testator was so much the more able (and presumably the more willing) to pay it. Upon the same ratio, the Earl of Cromarty having settled on his lady a certain jointure, subject to be increased in case there should be "no children of the marriage who shall succeed to and enjoy the estate,"—on his being attainted, the Countess was found entitled to the larger jointure.[3] Where a residue was divided amongst the testator's children, with a special direction to invest as much as would yield £150 per annum as an annuity to an unmarried daughter, it was held that the capital sum so invested belonged to the other residuary legatee, subject to the life interest of the unmarried daughter.[4] In another case, where a legacy was made payable by P. M., one of the granter's heirs, in case of *his* succeeding to a certain estate, and it was also declared to be binding upon the heirs and representatives of P. M., but P. M. did not succeed to the estate, there was held to be no implied obligation on a representative who afterwards succeeded to a part of the property.[5]

Survivorship not implied from gifts of distinct interests in the same subject.

600. Where distinct interests are given to two persons in the same estate (*e.g.*, liferent interests in severalty, or an annuity to the one and the surplus income to the other), and the estate is

[1] Mr. Jarman suggests (5th ed. vol. i. p. 512) that this case is ruled by the principle of the decisions as to liferents, and that a gift by implication only arises in the case of the ulterior destination being in favour of the testator's heir. But it must be conceded that the reference to the period of majority (which is the time usually chosen for giving a vested right) is an element creating a very strong presumption of an intention to benefit the person whose attainment of the state of complete civil capacity is made the condition which is to determine the destination of the estate; and the authorities cited by the learned author are adverse to the opinion which he expresses, and in favour of that for which we contend.

[2] *Wedderburn* v. *Scrimgeour*, 1666, M. 6587.

[3] *Countess of Cromarty* v. *The Crown*, 1764, M. 6601.

[4] *Mackenzie's Trs.* v. *Mitchell*, 1875, 2 R. 469.

[5] *Moncreiff* v. *Skene*, 29 June 1825, 1 W. & S. 672.

destined to other persons on their deaths, no liferent by implication accrues to the survivor in the estate taken by the predecessor.[1] Nor does the law of Scotland recognise any implication in favour of children subsequently born from provisions of equal sums to the children existing at the date of the settlement.[2] The subject of the implied conditional institution of children under the *conditio si sine liberis*,[3] and implied survivorship in joint destinations,[4] belong to a different department of the law of succession.

SECTION III.

Implication from Gift of Income where Capital undisposed of.

Doctrine confined to bequests of moveable estate.

601. In this class of cases it is necessary to distinguish the case of legacies of money from grants of heritable estate. In the case of liferents of heritage, the favour with which the law regards the right of the heir-at-law would, in most cases, outweigh any implication that might be deduced from expressions of personal regard to the liferenter, or other similar indications of intention.

Whether undisposed-of capital given by implication to legatee of the income.

602. Where a legacy is given in the form of a direction to trustees to pay the interest of a fund without any special appropriation being made of the capital, it is a question of intention whether the fee is comprised in the description of the interest given. This, at least, is the principle of construction followed in Scotland; and the rule that a bequest of interest includes the principal, which is laid down by English writers of authority, is qualified by the observation that the construction must be consistent with what appears to be the intention of the testator.[5] Theoretically, of

[1] *Pursell* v. *Elder*, 24 March 1865, 3 Macph. (H.L.) 59 (3d point).

[2] *Anderson* v. *Anderson*, 1734, 1 Cr. St. & P. 136. On the question of gifts by implication to a posthumous child, see *Oliphant* v. *Oliphant*, 1794, Bell (Fol. Ca.), 125, 5 Br. Sup. 648; *Dempster* v. *Willison*, 1799, M. 16,947. On the converse case, whether a provision for a posthumous child is effectual in case of the child being born before the death of the parent, see *White* v. *Barber*, 5 Bur. 2703, and cases cited in 1 Jarman, 3d ed. p. 506.

[3] Chapter XXXIX. (*Conditio si sine liberis*),

[4] Chapter XXXV. (Survivorship).

[5] Williams on Executors, 8th ed. 1199; Roper on Legacies, p. 1475. To this extent, at least, the doctrine appears to have been fixed by Sir W. Grant's judgment in *Page* v. *Leapingwell*, that in the case of a legacy of stock, "an indefinite gift of the dividends gives the absolute property of the stock" (18 Ves. 463–7). This is considered so well settled, that in an equity case, where a testator gave his servant the half-yearly interest of £1000 stock, with a power of disposal (which would naturally imply an intention to give a life interest only), Sir John Romilly ruled that it was an absolute gift to the legatee, "with a superadded power to dispose of it by her will, but which does not derogate or detract from the prior absolute gift;" *Southouse* v. *Bate*, 16 Beav. 132.

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course, a gift of the income of a fund in perpetuity is indistinguishable from a gift in fee; but this is not the form in which a gift of a subject would usually be made, and in real cases a question as to the testator's intention is always necessarily raised. In *Sanderson's Executors* v. *Kerr*,[1] a bequest of capital was implied from a direction to executors to invest £2000 for the benefit of the testator's son and daughter equally, and as to each of the shares, to pay the interest thereof, or apply it to the use of his said son and daughter, subject to the declaration, "that I leave it to my executors entirely in what manner to apply these sums, whether to pay the same directly, or apply it and pay it to others for behoof of my son and daughter." This case may be compared with *Burnsides* v. *Smith*,[2] where a direction in nearly similar terms was held to import only a discretionary power in the trustees, which had become lapsed in consequence of the trustees not having exercised the power in the lifetime of the beneficiary. In *Anderson* v. *Thomson*[3] one of the questions was as to the import of a testamentary letter addressed by a lady to her law-agent, in which she directed him "to hold the residue of my estate and distribute it annually between the following gentlemen." It was held that this was equivalent to a gift of the fee, but it may be collected from the opinions that the words used were not construed as equivalent to a gift of the income in perpetuity, but rather as a direction to make an annual division of the capital as and when it should be realised and become distributable. The latest authority is *Lawson's Trustees*,[4] where a direction to pay the proceeds of a share of residue to two sisters was held to vest the fee in the survivor, on the ground that the trustees were empowered to apply the capital in the purchase of an annuity in favour of the two sisters and the survivor, and that the capital was not otherwise appropriated.

Effect of destination of liferent and fee where the destination of the fee is revoked.

603. In connection with this subject, the question has been proposed, whether, in the case of a life interest being given to a legatee, subject to a destination-over, if the testator revokes the destination-over, the revocation will raise the life interest to a fee? We incline to give an affirmative answer as to cases where the life estate is described in popular language, *e.g.*, the *interest* of a certain sum, or the *use* of a subject. The cases in relation to

[1] *Sanderson's Executors* v. *Kerr*, 21 Dec. 1890, 23 D. 227.

[2] *Burnsides* v. *Smith*, 10 June 1829, 7 Sh. 735.

[3] *Anderson* v. *Thomson*, 1877, 4 R. 1102.

[4] *Lawson's Trs.* v. *Lawson*, 1890, 17 R. 1167. See also *Downie's Trs.* v. *Cullen*, 1882, 9 R. 749; *Lindsay's Trs.* v. *Lindsay*, 1880, 8 R. 281; and *Dalglish's Trs.*, 16 R. 559, where, by construction at once refined and practical, the fee (in the event of failure of issue) was held to be given by implication to institutes, on whom a liferent only was directly conferred.

destinations to children *nascituri* show that "liferent" is a flexible term,[1] and there is no reason why it should not be construed as importing a fee in other cases in which the intention to use the word in this sense is sufficiently manifested. In *Sharpe* v. *Sharpe's Trustees*,[2] the settlement was to an institute in liferent, with a series of substitutions, which failing, to the settlor's nearest heirs and assignees whatsoever. The settlor having afterwards revoked the substitutions, Lord Jerviswoode held that the ultimate destination to *heirs* and *assignees* was a sufficient destination-over to prevent the fee from vesting in the liferenter; though, it will be observed, the destination was to the same persons who might have claimed the resulting interest, had there been no disposal of the fee.

Successive liferents.

604. The principle that the benefit of the revocation of the ulterior destination accrues to the liferenter, is, moreover, supported by the decision of the Second Division of the Court on one of the points in the case of *Scott* v. *Sceales*.[3] A sum of £3000 was given by a trust-deed to a mother in liferent, and after her death to her daughter, also in liferent. By a subsequently executed codicil the testatrix revoked the legacy to the mother; it was held that the daughter in consequence took an immediate liferent, and that the income during the mother's life did not become lapsed or fall into residue.

SECTION IV.

Implication from Powers of Appointment.

General power not coupled with a destination-over in default,—whether amounting to a gift by implication.

605. On the question whether a liferent, with a power of disposal, amounts to a gift by implication of the fee, reference is made to a subsequent chapter.[4] The case of a liferent by reservation with the power of revoking the settlement, and otherwise disposing of the estate (although undoubtedly constituting a fee-simple estate in the granter of the deed), is scarcely to be regarded as an estate by implication, the true principle being that the granter continues to possess on his original title, and that the effect of the deed of conveyance is suspended until it becomes irrevocable by his death. A general power of disposal given to a liferenter, when followed by a destination of the fee conditioned to

[1] This subject, which is only indirectly connected with that of the present chapter, is discussed *infra*, Chapter XXXIII., Section II. (Legacies subject to Life Interests).

[2] *Sharpe* v. *Sharpe's Trs.*, 18 Feb. 1862; *Belfrage* v. *Davidson's Trs.*, 7 Jan. 1862 (Lord Jerviswoode). As to the effect of a gift in liferent coupled with a power of disposal, see Chapter LX. (Powers of Disposal).

[3] *Scott* v. *Sceales*, 20 July 1865, 3 Macph. 1130. This, however, is rather the converse of the case put in the last paragraph.

[4] Chapter LIX. (Powers of Disposal).

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take effect in case of the non-exercise of the power, does not make the person to whom the power is given a fiar;[1] but it has been generally considered that such a power, if unqualified in its terms, and including therefore the power of alienation *inter vivos*, would, in the absence of any ulterior destination, vest the estate in the donee of the power; and according to the opinions delivered by the highest authority in a modern case, the same effect is to be attributed to a general power of disposal without the grant of a liferent, which (in the view taken of the meaning of the power) is obviously superfluous.[2]

Whether a general power of selection vests an estate in the objects of the power.

606. Sometimes a power is given to trustees of selecting objects from a prescribed class amongst whom a fund or estate is to be divided; and trustees may also be empowered to grant provisions, or to fix the amount of provisions to be settled on a member or members of the testator's family. The question then arises, whether the grant of a power of this kind vests by implication an absolute right in the persons or class of objects in favour of whom it is intended to be exercised. Where the class of objects is such, and the discretion of the trustees so wide, that the trust may properly be described as one of a charitable or eleemosynary character, the principles of administration of charitable trusts make the right so far independent of the action of the trustees, that, in the event of the failure of the trustees, the trust may be administered by the Court through the intervention of new trustees.[3] Where it is a proper power of selection, the failure of the trustees will carry with it the failure of the bequest.[4]

Effect of limited powers of appointment.

607. In the case of a simple power of appointing a provision, there is some authority for the proposition that the gift is contingent on the exercise of the power. In *Burnsides* v. *Smith*,[5] a power having been given to trustees, "in the event of their considering it proper," to pay to the testator's niece a legacy of £1000, "at such times and in such payments as they in their discretion might think expedient," it was given in evidence that the trustees had actually resolved to pay the legacy, and had entered in their

[1] See Chapter LIX., Section V.

[2] *Pursell* v. *Elder*, 24 March 1865, 3 Macph. (H.L.) 59:—"If an estate or a sum of money be given to an individual, who is *sui juris*, without words of limitation, or a declaration of the extent of his ownership, but with words indicative of the intention of the testator that he should have the absolute *jus disponendi*, then, in any case, these words are to be taken as indicating an intention that he should be the absolute owner;" per Lord Westbury (distinguishing the case of a power given to a married woman, which was held not to vest the fee in the donee). Lords Cranworth and Kingsdown concurred.

[3] *Dundas* v. *Dundas*, 27 Jan, 1837, 15 Sh. 427. See Chapter LIII. (Administration of Charitable Trusts), Section VII.

[4] *Robbie's Judicial Factor*, 1893, 20 R. 358.

[5] *Burnsides* v. *Smith*, 10 June 1829, 7 Sh. 735.

sederunt-book a view of the trust affairs wherein this legacy was entered, along with debts and other legacies not dependent on their discretion, as a deduction from the proceeds of the estate; but that they had not, prior to the death of the legatee, made an entry in their minutes binding themselves to pay it. It was held, notwithstanding, that the legacy became lapsed, and that it did not pass to the executors of the legatee.[1]

Power of division implies a joint estate in the objects, in default of execution.

608. It is well established in our law and practice that a legacy to a family or class of persons, to be divided in such shares as may be appointed by parents, trustees, or other persons, vests in the class, and gives by implication a right to each person to an aliquot part of the fund proportionate to the number of persons, in case of the power of division being either not exercised at all, or being exercised in an irregular manner.[2]

SECTION V.

Implied Gift of Accessory Rights.

Accessory subjects not specially bequeathed follow the principal subject.

609. The general rule is well established, that subjects conveyed to trustees, but not specially appropriated, result to the heir-at-law.[3] The rule, however, has been considered to admit of an exception in the case of the undisposed-of subject being clearly accessory to or necessary to the enjoyment of estate, the purposes of which are declared in the will. In such a case, the disposition of the beneficial interest in the principal subject may be regarded as carrying with it a gift of the accessory subject by implication.[4]

[1] See *contra*, *Mackay* v. *Ewing*, 10 July 1867, 5 Macph. 1004.

[2] *Sivright* v. *Dallas*, 27 June 1824, 2 Sh. 643, N.E. 543; *Stein* v. *Stein*, 8 Dec. 1826, 5 Sh. 101, N.E. 93; *Watsons* v. *Marjoribanks*, 17 Feb. 1837, 15 Sh. 586; *Jardine* v. *Jardine*, 22 Jan. 1850, 12 D. 504. See Chapter LIX. (Powers of Division).

[3] Chapter LVII., Section I. (Resulting Trusts).

[4] *Dennison* v. *Fea's Trs.*, 1873, 11 M. 392 (Ground-rent acquired after the date of the will disposing of the subjects); *Arbuthnot* v. *Arbuthnot*, 1766, M. 6310 (arrears of interest due upon a bond); *Gillespie* v. *Marshall*, 1802, M. "Accessorium," App. No. 2 (interest undisposed of to be accumulated with the principal); *Grant's Trs.* v. *Grant*, 2 July 1862, 24 D. 1211, 4th point (furniture of a house found to go with the estate to the heir under a trust-settlement); *Cuninghame* v. *Vassall*, 1871, 10 M. 49 (legacy of a debt held to carry interest). See as to bonuses on policies, *M. of Queensberry* v. *Scottish Union Ins. Co.*, 1 D. 1203; *Shand* v. *Blaikie*, 21 D. 878; *Sparks* v. *Barnett*, 1890, 17 R. 997.

CHAPTER XVII.

HERITABLE ESTATE, WHETHER CARRIED BY GENERAL WORDS IN A WILL OR SETTLEMENT.

Testamentary gifts of heritable estate under Titles Act of 1868.

610. It is convenient to begin by reprinting the provisions of the Titles Act, 1868 (sections 20 and 21), and the Conveyancing Act, 1874 (section 27), relating to this subject:—

Section 20. (1) From and after the commencement of this Act, it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings; (2) and no testamentary or *mortis causa* deed or writing *purporting to convey or bequeath lands* which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the granter has not used, with reference to such lands, the word "dispone," or other word or words importing a conveyance *de præsenti*; (3) and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, *but shall contain with reference to such lands any word or words* which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the nineteenth section hereof by the granter of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create and shall create in favour of such grantee or legatee an obligation upon the successors of the granter of such deed or writing to make up titles in their own persons to such lands, and to convey the same to such grantee or legatee; (4) and it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition of such lands in favour

of such grantee or legatee, and that either by notarial instrument or in any other manner competent to a general disponee; (5) provided always, that nothing herein contained shall be held to confer any right to such lands on the successors of any such grantee or legatee who shall predecease the granter, unless the deed or writing shall be so expressed as to give them such right in the event of the predecease of such grantee or legatee.

Section 21. (6) Where such testamentary or *mortis causa* deed or writing shall be conceived in favour of a grantee *as trustee or executor of the granter*, and shall not be expressed to be wholly in favour of such trustee or executor for his own benefit, such trustee or executor shall apply such whole lands for the purposes specified in such deed or writing; (7) and where such purposes cannot, in whole or in part, be carried into effect, or where no purposes with reference to such lands have been or shall be specified in such deed or writing, such trustee or executor shall convey such lands, or so much thereof, or shall apply so much of the proceeds thereof, if such lands shall have been sold and realised by him, as may not be required for the purposes of such deed or writing, to or for behoof of the person or the successors of the person who, but for the passing of this Act and the granting of such deed or writing, would have been entitled to succeed to such lands on the death of such granter.

Section 27. (8) It shall not be competent to object to the validity of any deed or writing as a conveyance of heritage coming into operation after the passing of this Act, on the ground that it does not contain the word "dispone," provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer.

State of the law prior to the passing of the Titles Acts, 1868 and 1874.

611. For convenience of reference, numbers have been prefixed to the different propositions included in the 20th, 21st, and 27th sections, and the words which are most referred to in the decisions are italicised. The state of the law antecedent to the Statute was this, that while a contract to sell or burden lands and heritages might be expressed in any intelligible form of words, and was enforcable against the heir, a testamentary or gratuitous gift of lands was neither effectual in itself nor as an obligation binding the heir unless it was in the form of a *de præsenti* conveyance, and there were only two ways of expressing such a conveyance; either the granter must "dispone" the lands to a grantee, or he must resign or grant a procuratory for resigning the lands to the superior for new infeftment in favour of the grantee. The most important part of section 20 are the sentences here numbered (1) and (2). Number (3) in effect prescribes that wills which include lands within their scope shall be subject to the same laws of con-

Summary of the enactments.

struction as wills of moveables; (4) makes the will binding on the heir; (5) applies the doctrine of lapse; (6) and (7) apply the principle of (3) to trusts; and (8) makes the word "dispone" unnecessary in the case of deeds *inter vivos*.

Different modes of referring to lands in a will.

612. In order that a will may take effect on the heritable estate, it must be, in the language of the Statute, a will "purporting to convey or bequeath lands;" and this purport or intention will be inferred when the testator uses "with reference to such lands" words of gift or bequest giving a claim either to an executor, or to a grantee or legatee. The cases which have been decided on the construction of the Statute are sufficiently numerous to admit of a generalised view of the subject being taken; and in fact it is easy to see that all the modes of referring to lands and heritages admit of being reduced to three; that is, the testator in describing the subject of his bequest may—(1) make use of such words as "property" or "estate," which cover everything that is disposable by will; or (2) he may distinguish between his heritable and moveable estates, describing the former either by its legal character as "heritage," or by proper descriptive words, such as "lands," "houses," "feu-duties," "lease," "farm," &c.; (3) he may designate the particular subject, as my house, or warehouse, in the town of A. But as no question of this nature arises under the third head, we have only to consider the first and second. It certainly was not the intention of the Legislature that a will of moveables should take effect as a disposition of heritage, and it follows that a testament or nomination of an executor with powers of administration will not carry the heritable estate. The view of the writer is given in the following quotation from his opinion in *Grant* v. *Morren*.[1] "The settlement in this case is not a will in the ordinary form, it is a testament proper; that peculiar form under which a testator, by naming an executor, disposes of his estate. The effect of such a testament as constituting a trust in favour of the next of kin is a purely statutory effect, depending on a Statute of the Scottish Parliament, which made it a trust to the extent of two-thirds of the estate, and on the Moveable Succession Act, which constitutes it a trust to the full extent. It is not to be supposed that in framing a will in this form the testator had heritage in view. If the maker of a testament introduces the words 'heritable estate,' or equivalent words, I should give effect to them; but if he speaks of 'estate' only, I should take it that he refers only to such estate as can be passed by a proper testament."[2] The will was held not to carry heritage.

[1] *Grant* v. *Morren*, 1893, 20 R. 404, at p. 408.

[2] Compare *M'Leod's Trs.* v. *M'Luckie*, considered *infra*, p. 334.

Construction of the words "property," "effects," &c.

613. It is not necessary that the will should contain words of direct gift. If a testator appoints trustees, directing them to realise his heritable and moveable property and to divide the proceeds, the direction is equivalent to a gift. This is the case of *M'Leod's Trustees* v. *M'Leod*,[1] and it is a fair example of what is signified by the statutory requirement of words sufficient to confer on the executor or grantee "a right to claim or receive" the estate. In the case of wills made in England, "real estate,"[2] and "freeholds in the county of Inverness,"[3] were interpreted in accordance with the obvious meaning of the words in the English law language. In the latter case, English words of destination were held to be translatable into their nearest equivalents in the Scottish system of jurisprudence. There is a tendency in the legal mind to exaggerate the ignorance and defects of lucidity in the minds of testators; but we may at least credit a testator who has anything to leave with a capacity for distinguishing between land and money. What in England is called by lawyers "realty," and in Scotland "heritage," is in ordinary colloquial language called *property;* and if a testator declares his mind with respect to his "property"[4] or "estate,"[5] it is reasonably certain that he means to dispose of his heritable property, if he has any. "Property" and "estate" are in fact the only perfectly general words which have to be considered, and there can be no doubt as to their sufficiency to carry heritable as well as moveable estate.[6] The word "effects" has in numerous cases been held to be inapplicable to heritage,[7] and indeed it is inconceivable that any one, however illiterate, who had a house or acres of land in his mind, should call either the one or the other his "goods and effects." It is on record that testators have used the phrase "effects, heritable and moveable;" but these words were not considered to be synonymous with heritable and moveable estate.[8] It need not excite surprise that testators of small fortune, while disposing with minute and scrupulous care of their money, furniture, trinkets, and family relics, should take no

[1] *M'Leod's Trs.* v. *M'Leod*, 1875, 2 R. 481. Similarly, Sp. Ca. *Hardy's Trs.*, 1871, 9 M. 736; and see *Robb's Trs.* v. *Robb*, 1872, 10 R. 692.

[2] *Connel's Trs.* v. *Connel*, 1872, 10 M. 627.

[3] *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, affirming 8 R. 249.

[4] *Oag's Curator* v. *Corner*, 1885, 12 R. 1162.

[5] *Aim's Trs.* v. *Aim*, 1880, 8 R. 294.

[6] "All that I have in the world," followed by an enumeration of moveables, held not to carry heritable property afterwards acquired, in *Ford's Trs.* v. *Ford*, 1884, 11 R. 1129. See cases in the next Chapter, Section II.

[7] *Pitcairn* v. *Pitcairn*, 1870, 8 M. 604, and the cases under the old law (*Brown*, *Cockburn*, and *Ross*) there cited; *Edmond* v. *Edmond*, 1873, 11 M. 348; *Ford's Trs.* v. *Ford*, *supra*.

[8] *Farquharson* v. *Farquharson*, 1883, 10 R. 1252; *Brown* v. *Bower*, 1770, M. 5440; *Cockburn* v. *Cockburn*, 1803, Hume, 131.

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notice of their houses or heritable property. The probability is, that in all such cases the omission is intentional, and that the testator's will is that his house should not be sold, but should be enjoyed specifically by his heir-at-law, or dealt with according to the investiture. It is therefore entirely consistent with just construction that even the word "estate" should be confined in its application to moveables where the context shows that the testator was not considering heritable estate, especially where the succession to the heritable estate is otherwise regulated.[1]

614. Opinions will differ as to the soundness of the decision in a case where a testator began by narrating his intention to dispose of his "property," and then proceeded to bequeath to his wife his whole "means and effects."[2] The decision (by a majority) was that the will took effect upon a house subsequently acquired; but as "means and effects" are words which, in their primary signification, do not apply to heritable property, and the testator at the time of using these words had no heritable property to leave, the decision seems to amount to an extension of the testator's meaning, not depending on the will itself.

Enumeration of moveables followed by general words.

615. If a testator begins by disposing of his moveables, and concludes with a residuary clause applicable to property or estate in general, the case falls within the rule that general words following an enumeration are not confined in construction to subjects *ejusdem generis*, unless they are connected by words of relation with the antecedent enumeration.[3] In construing a will in this form, the Lord Ordinary (with whom the Court agreed) observed:[4] "The testatrix proceeds to leave various small legacies, which more than exhaust the sum in the inventory, and then directs her trustee 'to sell the remainder of my property wherever situated,' and to divide it equally between her grandnieces. Now, considering that the word 'trustee' is capable of importing a universal title of administration, and that the word 'property' is a universal appellative, adequate to pass heritable as well as moveable property, and that there are no limiting words in any part of the will which would impose a meaning on these words less extensive than the widest meaning which they will bear, I come to the conclusion that this is in legal effect, as well as in intention, a will disposing of the testator's whole estate." The difference between this case and

[1] *Farquharson's* case, *supra*; per Lord Brougham in 6 Moore, P.C. Ca. 82; *Grant* v. *Morren*, *supra*, p. 332. And see *Farquhar* v. *Farquhar*, 1875, 3 R. 71.

[2] *Forsyth* v. *Turnbull*, 1887, 15 R. 172.

[3] See cases cited *infra*, § 623.

[4] *M'Leod's Trs.* v. *M'Luckie*, 1883, 10 R. 1056, at p. 1058, per Lord M'Laren. It is difficult to reconcile with this case the previous decision of the same Court in *Urquhart* v. *Dewar*, 1879, 6 R. 1026. The Judges who took part in the last-mentioned case (including the Lord Ordinary) were divided, three to two.

Grant v. *Morren*,[1] where the same Court held that the heritable estate did not pass, is that in *Grant* v. *Morren* the word "estate" was connected by words of relation with the appointment of an executor, while in the case of *Macleod* the direction to sell and divide the residue was an independent gift. And this comparison gives point to the observation made in one of the cases, that the decisions are to be followed by discriminating and correctly applying their principles, rather than by attempting to collate the expressions used in other wills with those which are used in the particular will which is under consideration.

Decisions as to general words under the common law rules.

616. The cases decided under the law as existing prior to 1868 may be legitimately referred to in questions under the Statute, because the Statute only did away with the necessity for dispositive language, and left the meaning of the will to be determined according to the ordinary rules of construction. There are cases deciding that the general words "means and effects, heritable and moveable," when used in the dispositive clause of a testamentary settlement, are inadequate to convey lands, or even heritable bonds or leases,[2] but it would seem that these words are sufficiently descriptive of the *universitas* of a truster's estate to receive effect according to the intention, when occurring in the less formal clauses of a will, as, for example, in a destination of residue.[3] At all events they have been so interpreted in the residuary destination of a general settlement, where, in consequence of an implied direction to sell, it was held that the truster had intended to deal with the beneficial interest as a moveable succession.[4] "Heritage," being equivalent to heritable estate, is a perfectly general term, and carries everything that would have gone to the heir-at-law, including leases.[5]

[1] *Supra*, p. 332.

[2] *Brown* v. *Bower*, 1771, M. 5440; *Cockburn* v. *Cockburn*, 18 Nov. 1803, Hume, 131.

[3] *Adv.-Gen.* v. *Williamson*, *infra*. The expression, "effects, of what nature and kind soever," in a *conveyance* to trustees, was held by Lord Langdale to include real estate, in *M. of Titchfield* v. *Horncastle*, 2 Jur. 610.

[4] *Adv.-Gen.* v. *Williamson*, 23 Jan. 1840, Excheq. Rep. & 13 D. 436, affirmed 16 Mar. 1843, 2 Bell, 89. It would seem, on the authority of English precedents, that the appointment of a "residuary legatee" carries the realty, if the deed contains a general conveyance of real and personal estate to trustees. See the cases of *Evans* v. *Crosbie*, 15 Sim. 600, where a testator gave all his real and personal estate to trustees, upon trust to pay certain legacies, and appointed his brother to be his residuary legatee; and *Wildes* v. *Davies*, 1 Sm. & Gif. 475, where the appointment was made by a codicil to a trust-settlement, conveying freehold, copyhold, and leasehold estates and also personalty, with a direction to sell, &c. Other words properly applicable to personalty, as "worldly goods" (*Wright* v. *Shelton*, 18 Jur. 445) "personal estates" (*Tofield* v. *Tofield*, 11 East, 246), "said house, goods, and chattels" (*Roe* v. *Walker*, 3 B. & P. 375), have been extended to real estate by force of the context; but it is doubtful whether such cases would be received as precedents by the Court of Session.

[5] *Duncan* v. *Rae*, 15 Feb. 1810, F.C.

CHAPTER XVIII.

OF THE DESCRIPTION OF PERSONS AND THINGS IN A WILL, AND OF UNCERTAINTY.

1. Of the Person or Object of the Gift (Effect of Falsa demonstratio).
2. Of the Estate or Subject of Gift, and of Descriptive Errors.
3. Of Precatory Wills and Trusts (Testamentary Intent, whether sufficiently expressed).
4. Of Wills which are void for uncertainty.

SECTION I.

Of the Person or Object of the Gift (Effect of Falsa demonstratio).

Rule of liberal construction of words of gift.

617. The rule of construction is that the testator is assumed to have intended to confer a benefit, and that his gift shall not be allowed to fail on the ground of error or misdescription, if the object can be ascertained. In most cases the context and the known facts of family history supply the necessary correction, and in cases of ambiguity extrinsic evidence is admissible under the limitations which are considered in a subsequent chapter.[1]

Objects of a gift.

618. The objects of a testamentary gift may be either (1) individuals named or designed and capable of being immediately ascertained, or (2) charities or objects of public utility, or (3) a class of persons considered as existing at a future time, so that the individuals composing the class cannot be ascertained until the time arrives or the event is determined. At present we are concerned only with gifts falling under the first and second heads, because the interpretation of bequests having relation to time and future events is the subject of the law of vesting.[2]

Effect of mistakes as to names and number of objects.

619. It is not surprising that testators should sometimes make mistakes with reference to the names and the number of the children of their collateral relatives, especially where these relatives are settled abroad or in distant parts of the country, or where the will or codicil is the act of a testator whose memory is impaired by age. As it seldom happens that there is any doubt as to the family or persons for whom the gift is intended, such cases do not

[1] Chapter XX.

[2] Chapters XLIII. to XLVI.

often come into Court, but examples are not wanting to prove the rule. Thus, where a testator bequeathed legacies "to each of the daughters procreate of the marriage betwixt A. B. and C. D. £400 sterling . . . £1200," and there were four daughters of the marriage, it was held that the insertion of a total corresponding to three legacies of £400 did not defeat the intention, and that each of the four daughters was entitled to claim a legacy of the value of £400.[1] Again, where a testator bequeathed to a niece by name a legacy of £3000, and "to each of the other three" children of his brother £2000, and the brother left four other children, it was held that each of the four children was entitled to a legacy of £2000.[2] A curious case of ambiguity occurred under the will of a testator whose brothers had all emigrated, and were settled in different parts of America. One of the legacies bore to be in favour of "my late brother James' son." The only child of James was a daughter, but the testator had a brother David, deceased, who had a son, to whom nothing was given under the will. The legacy was found to be in favour of James' daughter, on the ground that it was less likely that the testator should make a mistake as to the name of his brother than that he should be in error as to the sex of the other brother's child.[3] A destination to "the nearest legitimate male issue of my ancestor H. F., namely, T. A. F. and his heirs-male," was held to be a good destination to T. A. F., and to be independent of the truth of the prefixed description of the disponee.[4]

Bequests in favour of relations in general terms.

620. Bequests contained in dispositions to trustees for the purposes of division amongst persons of kin to the testator, *e.g.*, for division "amongst relations not herein named," or to any of the truster's "blood relations" that the disponee should think the most fit,[5] or to such of the truster's "mother's relations" as his trustees should appoint,[6] to such of the truster's "friends or relations" as might be pointed out by his wife, with the approbation of the majority of trustees,[7] to the truster's "poorest friends and relations, whom he might have forgot,"[8] or to "poor descen-

[1] *Maclehose* v. *Bogles*, 28 Feb. 1815, F.C., Hume, 274. See *Anderson* v. *Anderson*, 18 July 1729, 1 Cr. St. & Pat. 136, reversing M. 6590; and *Stewart* v. *Stewart*, 26 Nov. 1813, F.C.

[2] Sp. Ca. *Bryce's Tr.*, 1878, 5 R. 723, 731.

[3] *Macfarlane's Trs.* v. *Henderson*, 1878, 6 R. 288. Errors in the spelling of the names of legatees are disregarded, as in *Keiller* v. *Thomson's Trs.*, 1824, 3 S. 396, N.E. 279.

[4] *Lord Lovat* v. *Fraser*, 1884, 11 R. 1119.

[5] *Wharrie* v. *Wharrie*, 1760, M. 6599; *Murray* v. *Fleming*, 1729, M. 4075.

[6] *Snodgrass* v. *Buchanan*, 1806, M. "Service of Heirs," App. No. 1.

[7] *Crichton* v. *Grierson*, 25 July 1828, 3 W. & S. 329.

[8] *Broun's Trs.* v. *His Relations*, 1762, M. 2318.

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dants "[1]—are sustained as implied trusts to be executed at the discretion of the trust-disponees for the benefit of persons of the class designated by the truster. A trust in favour of "relations" to be selected by the trustees, includes relations by the mother's as well as the father's side;[2] and the principle has been extended to the case of an unconditional bequest to "nearest relations," so as to include the children of a sister-uterine who was named in other parts of the settlement along with the granter's brother-german.[3] A destination to descendants or other relations, to be selected according to the discretion of the trustees, is held to fail by their declinature of the trust, for here the power of selection is essential to the execution of the trust, and is not merely incidental, as in the case of a charity.[4] A declaration that a fund is "to be divided equally," has been held equivalent to a bequest to the next of kin in equal shares.[5]

Bequests to charities described in general terms.

621. The object of a bequest is not considered "uncertain" where a legacy is given to the charities of a certain town,[6] the poor of a presbytery,[7] or the like, or even to charitable objects to be selected by the testator's trustees.[8] A bequest of a fund for the payment of twenty shillings in the pound to the truster's creditors, "as the same shall be set forth in a list which I intend to leave," was sustained, although no list was found; and extrinsic evidence was admitted for the purpose of ascertaining the persons entitled to share in the distribution of the fund.[9] Errors and misdescriptions in bequests to existing charities or religious institutions are rectified when possible, as in the case of bequests to individuals.[10] On

[1] *Cairnie* v. *Cairnie's Trs.*, 14 Nov. 1837, 16 Sh. 1; *Macnair* v. *Macnair*, 1791, M. 16,210; and see *Thomson* v. *Cumberland*, 16 Nov. 1814, F.C.

[2] *Broun's Trs.* v. *His Relations*, 1762, M. 2318.

[3] *Scott* v. *Scott*, 10 May 1855, 2 Macq. 281, affirming 14 D. 1057; and see *Norris* v. *Norris*, 11 Dec. 1838, 2 D. 220.

[4] *Robbie's Jud. Factor* v. *Macrae*, *infra*, p. 351; *Dick* v. *Ferguson*, 1758, M. 16,206 and 7446.

[5] *Dundas* v. *Dundas*, 27 Jan. 1837, 15 Sh. 427. But see *M'Cormack* v. *Barber*, 25 Jan. 1861, 23 D. 398. In England trusts have failed for want of certainty in the object, where the estate was given to A. "with a hope that he would continue it in the family" (*Harland* v. *Trigg*, 1 B. C. C. 142); or on trust for distribution "amongst such members of A.'s family" as might be thought most deserving (*Green* v. *Marsden*, 1 Drew. 646), or "to such of the heirs of the testator's father as she might think best deserved a preference;" *Meredith* v. *Heneage*, 1 Sim. 542 (in H.L.).

[6] *Hill* v. *Burns*, 14 April 1826, 2 W. & S. 80; *Mags. of Irvine* v. *Muir*, 1888, 15 R. 396; *Jack* v. *Burnett*, 28 Aug. 1846, 5 Bell, 409; *Boe* v. *Anderson*, (first point), 11 Nov. 1857, 20 D. 11; but see the ultimate decision, 8 March 1862, 24 D. 732.

[7] *Presbytery of Deer* v. *Bruce*, 20 Jan. 1865, 3 Macph. 402.

[8] *Kelland* v. *Douglas*, 28 Nov. 1863, 2 Macph. 150.

[9] *Sprot* v. *Pennycook*, 12 June 1855, 17 D. 840.

[10] *Synod of Aberdeen* v. *Milne's Trs.*, 25 Feb. 1847, 9 D. 745; *Scottish Miss. Soc.* v. *Home Mission Committee*, 19 Feb. 1858, 20 D. 634; *Pringle* v. *M. of Tweeddale*, 16 Dec. 1823, 2 Sh. 588, N.E. 505;

this subject reference is made to a separate chapter on charitable bequests.[1]

SECTION II.

Of the Estate or Subject of Gift, and of Descriptive Errors.

Limits of the subject.

622. Referring to the preceding chapter on the subject of gifts or conveyances of the heritable estate in general, we are now to consider whether some particular species of estate or some particular subject is carried by descriptive words in a will. On this subject three general rules may be deduced from a consideration of the authorities.

Effect of particular followed or preceded by general words *ejusdem generis*.

623. *First*, A gift consisting of an enumeration of subjects belonging to one of the categories of heritable or moveable estate, followed by general words, which are either words of reference or words *ejusdem generis* with the subjects enumerated, is confined in construction to the kind of subjects specially enumerated. On this principle, a conveyance of insight plenishing, household furniture, and other moveable goods was held not to include *nomina debitorum*.[2] So also it was held that a conveyance of "all my plate, and horses, and *moveables* whatsoever," would not include a personal bond, seeing that there was no mention in the enumeration of moveable rights.[3] And in a later case,[4] it was held that the expression "whole other moveable estate," following an enumeration of corporeal moveables, did not enlarge the right of the disponees to the effect of including moveables other than corporeal. But where words of general conveyance *precede* the enumeration of articles of the *genus*, the position of the general words in the sentence indicates that they are intended to have a substantive operation. A bequest in this form is therefore effectual as a gift of the general estate, and the enumeration is held to be merely illustrative. In a modern English case,[5] a bequest of the remainder of "my money in the Spanish bonds" was held residuary, the particular words being merely descriptive of the mode of investment at the time of making the will. On this principle also a bequest of the testator's "personal property, consisting of money and clothes," was held to pass the general personal estate.[6]

Sommervail v. *Edin. Bible Soc.*, 22 Jan. 1830, 8 Sh. 370; *Duff's Trs.* v. *Scripture Readers*, 18 Mar. 1862, 24 D. 557, note; *Wilson's Exrs.* v. *Soc. for Conversion of Israel*, 1869, 8 M. 233.

[1] Chapter LIII., Section I.

[2] *Ker* v. *Young*, 1745, M. 2274.

[3] *Dunbar's Trs.* v. *Dunbar*, 15 Jan. 1808, Hume, 267; *Mochrie* v. *Linn*, 1736, M. 5018.

[4] *Carsewell's Trs.* v. *Carsewell*, 9 Feb. 1858, 20 D. 516.

[5] *Patrick* v. *Yeathead*, 33 L.J. Ch. 286.

[6] *Dean* v. *Gibson*, 3 Law Rep. Eq. Ca. 713, where the previous authorities were

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Distinction where the general words apply to a different description of estate.

624. *Secondly,* General words following a particular enumeration of subjects constituting a different description of estate receive effect according to the natural meaning of the words.[1] In this case the general words cannot in fair construction be considered to be referential words. Thus, a disposition of "every subject, whether heritable or moveable," or of "every moveable and immoveable subject," [2] found in conjunction with an enumeration of moveable subjects, is a good conveyance of lands and heritages. The rule that the word "estate" carries both real and personal property,[3] which is a rule of general jurisprudence, is illustrated by the Privy Council case of *Mayor of Hamilton* v. *Hodsdon,*[4] where Lord Brougham observed: "The word 'estate' is *genus generalissimum,* and will, by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the realty as well as the personalty; and is not to be confined and restrained to

examined and distinguished by Vice-Chancellor Wood. It would seem that the rule of construction of such bequests agrees with our own in so far that general words superadded to an enumeration are confined to subjects *ejusdem generis.* Thus, on the construction of a bequest of furniture, plate, household goods, *and other goods* to one person, and the residue of personal estate to another, the Court, not to disappoint the residuary legatee, restricted the words "other goods" to corporeal moveables; *Woolcomb* v. *Woolcomb,* 3 P. W. 112. In a later case the Chancellor of Ireland, Lord St Leonards, ruled that the words "all other chattel property," annexed to a bequest of household furniture, plate, and house linen, must be held to mean other chattel property *ejusdem generis,* partly on the ground that there was a subsequent residuary gift; *Lamphier* v. *Despard,* 2 D. & War. 59; see also *Barret* v. *White,* 24 L.J. Ch. 724. In a recent case a bequest of "the whole of my capital *in* ready-money, and *in* bank billets" (Russian paper), was held to imply only a special bequest of the subjects described; the Lords Justices reserving their opinion as to the law applicable supposing "in" had been omitted; *Wylie* v. *Enohin,* 29 L.J. Ch. 341; affd. 3 April 1862, 31 L.J. Ch. 402.

[1] In *Woolam* v. *Kenworthy,* 9 Ves. 137, a residuary gift of "estate" was restricted to personalty by the controlling effect of the context, although the will contained a specific devise of lands; Lord Eldon observing that the question whether "all my estate and effects" will include real estate or not depends, first, on the immediate context of the will; and, secondly, on the general form and scheme of the will as demonstrating intention. A similar decision was pronounced by the King's Bench in *Helling* v. *Yeud,* 2 B. & P. N.R. 214, on the construction of the word "property," followed by an enumeration of "goods, stock, bills, bonds, book debts, and securities." When the law became more settled, the rule was laid down absolutely, that unless an intention to restrict appear from the context of the will, general words, although associated with words descriptive of personalty, will carry the real estate. "The doctrine of modern cases is, that where there is nothing to qualify the word 'estate,' it will carry real as well as personal estate; and the contrary intention ought to appear to induce the Court to put upon that word a less extensive signification than it naturally bears;" per Sir W. Grant in *Barnes* v. *Patch,* 8 Ves. 607. The cases are fully commented on in 1 Jarman, 5th ed. 670 *et seq.*

[2] *Glover* v. *Brough,* 7 Dec. 1810, F.C.; *Welsh* v. *Cairnie,* 28 June 1809, F.C., and cases there cited. Compare *Brand* v. *Brand,* 1734, M. 15,941.

[3] See *Neilson* v. *Stewart,* 22 D. 647; *Munro* v. *Munro,* 17 Dec. 1825, 4 Sh. 328, N.E. 332.

[4] *Mayor of Hamilton* v. *Hodsdon,* 6 Moore, P.C. Ca. 76, see 82.

personalty only, unless there is a clear interest expressed in other parts of the will, to be gathered either from the will or from the way in which the word is used in the particular part of the will where the contested use of it arises."

General words, to be effectual, must be appropriate.

625. *Thirdly*, But the general words, importing a disposition of estate, whether heritable or moveable, must be appropriate to the quality of the estate intended to be given, otherwise they fail to give adequate legal expression to the intention. For example, "goods and gear, whether heritable or moveable," is an obvious misnomer, unless it is intended to apply to heirship moveables. A conveyance in those terms is therefore ineffectual to carry even a lease of heritable property.[1] "Shares of heritable estate" in a codicil were held to include moveable as well as heritable estate, because they were connected by proper referential words with the residuary clause of a will disposing of the entire estate.[2] It is doubtful whether a general conveyance in fee does not operate as a revocation of a previous alimentary provision to the same person, so as to deprive the legatee of the intended protection.[3]

What words comprehend *acquirenda* and residuary estate.

626. With respect to the import of general words, a point of considerable importance in practice is determined by the case of *Hughes' Trustees*,[4] viz., that where a testator disposes separately of his heritable and moveable estates to different legatees, the expression "moveable estate" includes heritable bonds, the quality of the succession rather than that of the subject being supposed to be in view. Under this head also may be classed those cases which relate to the applicability of the expressions used by a testator to *acquirenda* and to residue. As to *acquirenda*, and particularly as to the force and effect of a disposition of estate which the granter may "conquest and acquire," reference is made to the cases of *Wyllie's Trustees*,[5] *Diggens* v. *Gordon*,[6] and other cases noticed in the discussion of marriage-contract provisions.[7] The wife's conveyance in a contract of marriage of estate "presently belonging or which she may acquire" is presumed to be limited to *acquirenda* during the subsistence of the marriage.[8] The term "residue," being in general use even in wills prepared without professional assistance,

[1] See *Paterson* v. *Farish*, 9 Feb. 1800, Hume, 128; *Sutherland* v. *Jeffrey*, Feb. 1805, Hume, 133; *Ross* v. *Ross*, 1770, M. 5019, and cases in M. *voce* "General Assignation;" also *Murdoch* v. *Murdoch's Trs.*, 27 Jan. 1863, 1 Macph. 330.

[2] *Clouston's Trs.* v. *Bullock*, 1889, 16 R. 937.

[3] See *White* v. *Eliott*, presently depending (Court of Seven Judges).

[4] *Hughes' Trs.* v. *Corsane*, 1890, 18 R. 299.

[5] *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121.

[6] *Diggens* v. *Gordon*, 3 Macph. 609; 1 L.R. Sc. Ap. 136, 5 Macph. (H.L.) 75.

[7] Chapter XXXVI., Section I. *Thurburn's Trs.* v. *Maclaine*, 3 Macq. 135.

[8] *Wardlaw* v. *Wardlaw's Trs.*, 1880, 7 R. 1066.

few questions have arisen with respect to equivalents for it.[1] "Surplus" is equivalent in meaning to residue; and in estimating its amount, all legacies and debts fall to be deducted.[2] "Free rents" is equivalent to surplus produce of heritable property; interest on heritable debts and the expenses of the trust are to be deducted.[3] "Interest of free money" has been held to include the surplus annual proceeds of the whole of the truster's moveable funds, whether invested in securities or in bank, under deduction of debts, but not, as it would seem, of legacies.[4] But by a later decision[5] it was ruled that "surplus cash," which in a popular sense may be said to be synonymous with "free money," would not carry securities such as bonds or bills, although the testatrix had left no other funds excepting what she had invested in such securities.[6]

627. Cases of ambiguity are to be resolved by extrinsic evidence,

[1] See Chapter XXXI., Section V.

[2] *Hamilton* v. *Bennet*, 14 Feb. 1832, 10 Sh. 330.

[3] *Morrison* v. *Knight's Trs.*, 14 Feb. 1837, 15 Sh. 560. As to the construction of this term, and what is to be deducted under the head of "annual outgoings," see *Preston's Trs.*, v. *Lord Melville*, 11 Jan. 1853, 15 D. 271.

[4] *Smith* v. *Donaldson*, 10 June 1829, 7 Sh. 734. See cases in next paragraph.

[5] *Jarvie* v. *Pearson*, 5 July 1860, 22 D. 1395.

[6] The following summary of English decisions on the construction of general words descriptive of the subject of the bequest may find a place here, though, in the strict order of arrangement, many of them ought rather to be treated under the head of Special Legacy :—

Effects.—"Effects of what nature or kind soever," in a special legacy, held not to comprise the general residue—per Sir W. Grant in *Rawlings* v. *Jennings*, 13 Ves. 39; and see *Hotham* v. *Sutton*, 15 Ves. 319.

Goods.—"Household furniture, plate, . . . and all other goods of whatever kind," were left to A., followed by pecuniary bequests to B., C., and D. Lord Langdale held that, in consequence of the subsequent bequests, the general words must be restricted to goods *ejusdem generis*,—*Wrench* v. *Jutting*, 3 Beav. 521. "All goods and things of every kind and sort whatever," which should be found in a certain closet, held not to include cash,—*Roberts* v. *Kuffin*, 2 Atk. 113; and *Gibbs* v. *Lawrence*, 30 L.J. Ch. 170. "Jewels, plate, and other goods," held to include residue,—per Sir J. K. Bruce in *Parker* v. *Marchant*, 1 Y. & C. 290.

Property.—"All my property, of whatever nature or kind, in a certain house," held not to carry mortgage securities, personal bonds, or bankers' receipts, on the ground that these have no locality,—per Lord Redesdale in *Fleming* v. *Brook*, 1 Sch. & Lef. 318. "Monies, goods, &c., my property," held by Sir J. Leach to be sufficient to pass the residue,—*Kendall* v. *Kendall*, 4 Russ. 360. "£1000; also my wines and property in England;" held by Lord Cottenham that the whole property in England, consisting of wines, stock, cash in bank, &c., was bequeathed,—*Arnold* v. *Arnold*, 2 My. & K. 365.

Personal Estate.—This expression is *nomen generale* for personalty; see *Martin* v. *Glover*, 1 Coll. 269.

Estate and Effects.—We have already seen (§ 623), that the word "estate," although followed by an enumeration of corporeal moveables, conveys the real property, and *a fortiori* it carries the personalty,—*Fisher* v. *Hepburn*, 14 Beav. 626.

Capital.—See *Wylie* v. *Enohin*, 31 L.J. Ch. 402, affirming 29 L.J. Ch. 341, and cases there cited. The meaning of words which *in terminis* are descriptive only of specific subjects will be discussed in the chapter on Legacies.

Admissibility of extrinsic evidence.

as in the case of ambiguity in the description of a person or object. Thus, where a testator made a gift of his heritable property in S., and tack thereof, and it appeared that the property was held in two portions by separate tacks, it was considered that the legatee was entitled to the subjects contained in the two leases.[1] "Shares lately bought by me for £300" were identified as shares for which the testator really paid £800;[2] and so where residue is wrongly divided all the residuaries share proportionally.[3] Such cases are to be carefully distinguished from those where a larger sum is given in a later instrument accompanied by words of reference to a prior instrument in which a smaller sum is provided; for here the principle of decision evidently is that the testator must have intended to give the legatee the benefit of the larger sum.[4]

Import of terms applicable to specific subjects or estate.

628. The subject may be concluded by a brief statement of the import of the decisions upon the meaning of words descriptive of specific subjects or estate. "Goods, gear, and sums of money," will carry corporeal moveables generally, not debts or other moveable rights.[5] "Goods, gear, debts," &c., does not carry heritable debts secured by adjudication.[6] "Goods and gear, whether heritable or moveable," will not carry a lease.[7] "Moveables whatsoever," coupled with words descriptive of corporeal moveables, will not carry moveable bonds.[8] "Moveable estate," following an enumeration of corporeal moveables, does not include moveable rights.[9] A legacy of "moveables" has been held to include heirship moveables.[10] "Cash" includes current coin and bank notes, but not bonds, bills, or other securities.[11] "All moneys and goods," in association with "money I am entitled to by my father's will," was considered to include the testator's *jus crediti* under his parents' contract of marriage;[12] and "money wherever deposited," following a series of specific bequests, was taken to be equivalent to residue

[1] Sp. Ca. *Wright's Trs.*, 1870, 8 M. 708.

[2] *Bruce's Trs.* v. *Bruce*, 1875, 2 R. 775.

[3] *Smith's Trs.* v. *Smith*, 1883, 10 R. 1144.

[4] *Forbes' Trs.* v. *Forbes*, 1893, 20 R. 248.

[5] *Mochrie* v. *Linn*, 1736, M. 5018, Elchies, "Implied Will," No. 1; *Fraser* v. *Smith*, 1776, M. 2322; Hailes, 709; *Earl of Fife* v. *M'Kenzie*, M. 2325; 6 March 1797, 3 Pat. 549; *Waddell* v. *Colt*, 1789, M. 5022; Pet. *Galloway*, 12 Jan. 1802, M. 15,950; *Brown* v. *Henderson*, 3 Dec. 1805, M. "Clause," App. No. 5.

[6] *Ross* v. *Ross*, 10 April 1771, 2 Pat. 254, affirming M. 5019.

[7] *Paterson* v. *Fairish*, 1800, Hume, 128; *Sutherland* v. *Jeffrey*, Feb. 1805, Hume, 133.

[8] *Dunbar's Trs.* v. *Dunbar*, 1808, Hume, 267; *Ker* v. *Young*, 1745, M. 2274.

[9] *Carsewell's Trs.* v. *Carsewell*, 9 Feb. 1858, 20 D. 516.

[10] *Ferguson*, 1682, 1 Fount. 193.

[11] *Jarvie* v. *Pearson*, 5 July 1860, 22 D. 1395. Compare *Smith* v. *Donaldson*, 10 June 1829, 7 Sh. 734.

[12] *Dunsmure* v. *Dunsmure*, 1879, 7 R. 261.

of the moveable estate.[1] "Free proceeds" of land includes the price of thinnings of woods.[2] "Right of reversion" is a term properly descriptive of estate burdened with a wadset.[3] "Rental" is subject to deduction of expenses of management, as well as public and local burdens.[4]

Corporeal moveables.

Furniture.

629. The reported cases in our Courts do not offer many examples of decisions upon the construction of terms descriptive of corporeal moveables. The meaning of "furniture" has been fixed with tolerable certainty. It includes articles of domestic use, but not books nor wine, nor, of course, money or securities.[5] A legacy to a lady, who was resident in the testator's house, of a quantity of plate, with "the whole of the furniture in her own bedroom, and any other she may choose for furnishing her house," was held to imply only a power of choosing liberally, but fairly, any other articles of furniture of similar extent and value with the furniture of her own bedroom.[6] A universal bequest to two legatees, including, among other articles, the testator's wearing apparel, was held in *Blair* v. *Blair*[7] to entitle either of the legatees to demand a specific conveyance of his share of the articles in question.[8]

Wearing apparel.

[1] *Easson* v. *Thomson's Trs.*, 1879, 7 R. 251; and see *Grant's Trs.* v. *Ritchie's Exr.*, 1886, 13 R. 646.

[2] *Breadalbane's Trs.* v. *Pringle*, 19 Jan. 1854, 16 D. 359.

[3] *Chisholm* v. *Chisholm-Batten*, 9 Dec. 1864, 3 Macph. 202.

[4] *Bell's Tr.* v. *Bell*, 1886, 13 R. 1188.

[5] Bell's Pr. § 1885; *M'Nab* v. *Spittal*, 1797, M. 2303; *Ker* v. *Young*, 1745, M. 2274; *Rankeillor* v. *Ayton*, 1709, M. 5759; *Cunninghame* v. *Livingstone*, 1737, M. 12,660; 5 Br. Sup. 195.

[6] *Reed* v. *Lord Strathallan*, 21 May 1835, 13 Sh. 810; and see 12 Sh. 426. In several English cases, a legacy of so many articles, forming part of a stock of the same description, has been held to give the legatee a right of selection; *Jacques* v. *Chambers*, 2 Coll. 435; *Richards* v. *Richards*, 9 Price, 226; *Kennedy* v. *Kennedy*, 10 Hare, 438.

[7] *Blair* v. *Blair*, 26 Feb. 1831, 9 Sh. 514.

[8] The following summary of the English decisions on the construction of terms descriptive of corporeal subjects is abridged from Jarman on Wills, 5th ed. 712, note.

The words "household goods," or "furniture," will include pictures hung up, and plate and house linen (Amb. 605; 2 P.W. 419; 5 Russ. 312), unless these words are used elsewhere in the will in contradistinction (Pr. Ch. 251); tenant's fixtures, unless affixed to the freehold (10 Sim. 186; Mos. 112; 1 P. W. 94); and prize medals, coins, and trinkets, if framed and hung, or otherwise disposed for ornament (21 L.T. 40; 5 Russ. 321); but not books (3 Atk. 201; Amb. 605; Mos. 112); or wines or or other consumable articles (3 Ves. 311; 3 P.W. 334); or goods belonging to the testator in the way of or used in carrying on trade (2 P.W. 302; 1 Ves. 97; Amb. 611; 7 D. M. & G. 55); or farming stock (3 Jo. & Lat. 727; 29 L.J. Ch. 875). But in *Cornewall* v. *Cornewall*, 12 Sim. 303, Sir L. Shadwell held that books were articles of domestic ornament. Now, this being the ground on which pictures are included in the word "furniture," that word ought also to include books, but it does not; so that Sir L. Shadwell's opinion is of doubtful authority. Of course books will be included in a bequest of furniture, if the testator's intention so to do can be collected from the will; *Ousley* v. *Anstruther*, 10 Beav. 462; see also *Cole* v. *Fitzgerald*, 3 Russ. 301. And under the terms "household furniture, implements of household, and articles of vertu," telescopes have been held to pass,—2 De G. & Sm. 425; as to a bust,

SECTION III.

Of Precatory Wills or Trusts. (Testamentary Interest, whether sufficiently expressed.)

Precatory bequests, in what cases amounting to a trust.

630. Where a testator, instead of directly giving and bequeathing, or declaring the purposes of his will, makes use of expressions which either denote a *wish to bequeath*, or suggest a purpose in the form of a *request or recommendation* to trustees (termed a Precatory Trust), he is held to have sufficiently expressed a testamentary intention.[1] A wish is in law equivalent to a will, and is binding on the executors as an implied trust for the objects of the gift. It has been maintained in some cases that trusts expressed in the form of a request or precatory gift are only intended to be binding on the conscience of the executor, or that they imply a reference to his discretion. But this is so far from being the case, that the executor has no option, except perhaps in relation to the choice of the means for effectuating the intention where the language is general or the purpose indefinite.[2]

Expression of a wish or intention equivalent to a bequest in favour of the object.

631. In the case of *Crichton* v. *Grierson*,[3] it was observed by Lord Lyndhurst that the expression of a *wish* to benefit a particular description of persons was equivalent to a trust for the benefit of the persons designated. The same judge, upon a review of all

quære, 1 Beav. 189. The words "household furniture and other household effects," it seems, extend to all that is in the house for use, consumption, or ornament; and have been held to comprise pistols, apparatus for turning, models, pictures, organ, parrot, books, wines, and liquors, but not a pony or cow, or a fowling-piece, unless used for domestic defence,—*Cole* v. *Fitzgerald*, 1 S. & St. 189; and, on appeal, 3 Russ. 301, and note; *Stone* v. *Parker*, 29 L.J. Ch. 874; nor articles exclusively of personal ornament, 2 Kay & J. 635. But the circumstance that the article has been sent away for repair or sale will not exclude it, 2 Jur. N.S. 514. As to the words "live and dead stock," see 3 Ves. 311; 3 Mer. 190; 12 Beav. 357. Growing crops, it seems, will pass under a bequest of stock of a farm, 6 East, 604, note; or stock upon a farm, 8 East, 339; but see 5 Russ. 12; and see 1 Roper on Leg., by White, 249. "Moveables," unrestrained, will take in all pure personalty, Mos. 296; and articles *temporarily* removed from a place will pass as articles *in* that place, 4 B. C. C. 537; but not articles permanently removed, 3 Mad. 276; 21 Beav. 548; 1 Jur. N.S. 250; nor articles intended to be, but never yet, taken thither, 2 De G. & S. 425. Under a gift of "plant and goodwill," the house of business held at rack-rent was held to pass, *Blake* v. *Shaw*,—1 Johns. 732.

[1] Stair, 1, 12, 2; Bell's Pr. § 1885, 5th ed. §§ 1871-2. See Dig. lib. 30, tit. 1, fr. 115, 118, where the words *cupio*, *opto*, *credo*, *desidero*, *uti des*, are declared to be equivalent to *exigo*, and to constitute a *fidei commissum*.

[2] Even as to the means, the executor has very little discretion where the purpose is of a charitable or *quasi*-charitable character, as the administration of the fund may be taken out of his hands by the Court at the suit of any person having a legal interest to interfere.

[3] *Crichton* v. *Grierson*, 25 July 1828, 3 W. & S. 329. See *Nasmyth* v. *Jaffray*, 1662, M. 5483, the earliest reported case of this description.

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the Scottish decisions on the construction of wills expressed in popular language, came to the conclusion that the law of Scotland was more favourable than that of England to the constitution of precatory and implied bequests.[1] The principle of interpretation established by the judgment of the House of Lords in the case under consideration, was acknowledged and applied in many subsequent cases in the Court of Session,[2] and it received the strongest confirmation in the judgment on the appeal in the leading case of *The Magistrates of Dundee* v. *Morris*.[3] Thus, the expression of the testator's "consent" that a legatee should receive a certain subject is held to be equivalent to a bequest of the subject, and a gift to a legatee "for the benefit of herself and her sister" was held to be a trust.[4]

Recommendation held binding on trustees as a will.

632. Again, it was laid down by Lord Brougham, in *Miller* v. *Black's Trustees*,[5] that a *recommendation* to trustees to execute a conveyance of the residue of the trust-estate to themselves, and to apply the annual proceeds to certain charitable uses, was equivalent to a direction. And where words necessary to complete the sense of a trust purpose are wanting, they may be supplied by implication from the context.[6] A recommendation to execute a *power* is not equivalent to a direction, for this would be to change the nature of the provision.

Doctrine as applied by the Court of Chancery in England.

633. The doctrine of the constitution of bequests and trust purposes by implication has received a fuller development from the decisions of the Courts of Equity in England than from those pronounced in this country, in consequence of the greater number of cases which have been submitted to judicial determination. The following summary of the import of the cases is given by Mr Lewin:—"If," he says, "the testator 'desire,'[7] 'will,'[8] 'request,'[9] 'will and desire,'[10] 'wish and request,'[11] 'wish and desire,'[12]

[1] 3 W. & S. 343.

[2] *Dundas* v. *Dundas*, 27 Jan. 1837, 15 Sh. 427; *Turnbull* v. *Doods*, 29 Feb. 1844, 6 D. 896; *Alexander* v. *Gordon*, 13 Dec. 1849, 12 D. 345.

[3] *Mags. of Dundee* v. *Morris*, 19 D. 918; 1 May 1858, 3 Macq. 134.

[4] *Scott* v. *Scoales*, 5 Feb. 1864, 2 Macph. 613; Sp. Ca. *Macpherson*, Jan. 16, 1894.

[5] *Miller* v. *Black's Trs.*, 14 July 1837, 2 S. & M'L. 866, affirming 14 Sh. 557.

[6] *Mags. of Edin.* v. *Univ. of Edin.*, 20 June 1831, 13 D. 1187; *Carsewell* v. *Carsewell*, 9 Feb. 1858, 20 D. 516; *Neilson* v. *Stewart*, 3 Feb. 1860, 22 D. 646; *Mags. of Dundee* v. *Morris*, *supra*.

Harding v. *Glyn*, 1 Atk. 469; *Mason*, v. *Limburg*, cited in *Vernon* v. *Vernon*, Amb. 4; *Trot* v. *Vernon*, 8 Vin. 72; *Pushman* v. *Filliter*, 3 Ves. 7; *Brest* v. *Offley*, 1 Ch. Rep. 246; *Cary* v. *Cary*, 2 Sch. & Lef. 189; *Cruwys* v. *Colman*, 9 Ves. 319; and see *Shaw* v. *Lawless*, L. & G. 154; S. C. 5 Cl. & Fin. 129; S. C., Ll. & G. *temp.* Plunkett, 559.

[7] *Eales* v. *England*, Pr. Ch. 200; *Clowdsly* v. *Pelham*, 1 Vern. 411.

[8] *Pierson* v. *Garnet*, 2 B. C. C. 38; affirmed *id.* 226; *Eade* v. *Eade*, 5 Mad. 118; *Moriarty* v. *Martin*, 3 Ir. Ch. Rep. 26; *Bernard* v. *Minshall*, 1 Johns. 276.

[9] *Birch* v. *Wade*, 3 V. & B. 198; *Forbes* v. *Ball*, 3 Mer. 437.

[10] *Foley* v. *Parry*, 5 Sim. 138; affirmed 2 M. & K. 138.

[11] *Liddard* v. *Liddard*, 6 Jur. N.S. 439.

'entreat,'[1] 'most heartily beseech,'[2] 'order and direct,'[3] 'authorise and empower,'[4] 'recommend,'[5] 'hope,'[6] 'do not doubt,'[7] 'be well assured,'[8] 'confide,'[9] 'have the fullest confidence,'[10] 'trust and confide,'[11] 'have full assurance and confident hope,'[12] 'under the firm conviction,'[13] 'well know,'[14] or use such expressions as 'of course the legatee will give,'[15] 'in consideration the legatee has promised to give,'[16] &c.,—in these and similar cases the intention of the testator is considered imperative, and the devisee or legatee is bound, and may be compelled, to give effect to the injunction. And though instances of this kind generally occur upon the construction of wills, the doctrine does not apply to wills exclusively, but has been extended to settlements *inter vivos*.[17]

Whether precatory direction effectual as a substitution.

634. A precatory direction to a disponee or legatee to dispose of the property in a particular way after the grantee's death, is not binding as the expression of a testamentary intention or trust, unless the right given to the grantee is limited to a liferent interest;[18] otherwise the request, in any view of its meaning, amounts to no more than a simple destination, which is defeasible at pleasure.[19]

[1] *Prevost* v. *Clarke*, 2 Madd. 458; *Meredith* v. *Heneage*, 1 Sim. 553, 555, per Chief Baron Wood; and see *Taylor* v. *George*, 2 V. & B. 378.

[2] *Meredith* v. *Heneage*, 1 Sim. 553.

[3] *Cary* v. *Cary*, 2 Sch. & Lef. 189; *White* v. *Briggs*, 2 Phill. 583.

[4] *Broun* v. *Higgs*, 4 Ves. 708, 5 *id.* 495; affirmed 8 Ves. 561; and in H.L. 18 Ves. 192.

[5] *Tibbits* v. *Tibbits*, Jac. 317; affirmed 19 Ves. 656; *Horwood* v. *West*, 1 S. & S. 387; *Paul* v. *Compton*, 8 Ves. 380, per Lord Eldon; *Malim* v. *Keighley*, 2 Ves. jun. 333; *ib.* 529; *Malim* v. *Barker*, 3 Ves. 150; *Meredith* v. *Heneage*, 1 Sim. 553, per Chief Baron Wood; *Kingston* v. *Lorton*, 2 Hog. 166; *Cholmondeley* v. *Cholmondeley*, 14 Sim. 590; *Hart* v. *Tribe* 18 Beav. 215; and see *Meggison* v. *Moore*, 2 Ves. jun. 630; *Sale* v. *Moore*, 1 Sim. 534; *ex parte Payne*, 2 Y. & C. 636; *Randal* v. *Hearle*, 1 Anst. 124; *Lefroy* v. *Flood*, 4 Ir. Ch. Rep. 1. As to *Cunliffe* v. *Cunliffe* (Amb. 686), see *Pierson* v. *Garnet*, 2 B. C. C. 46; *Malim* v. *Keighley*, 2 Ves. jun. 532; *Pushman* v. *Filliter*, 3 Ves. 9.

[6] *Harland* v. *Trigg*, 1 B. C. C. 142; and see *Paul* v. *Compton*, 8 Ves. 380.

[7] *Parsons* v. *Baker*, 18 Ves. 476; *Taylor* v. *George*, 2 V. & B. 378; *Malone* v. *O'Connor*, Ll. & G. *temp.* Plunkett, 465; and see *Sale* v. *Moore*, 1 Sim. 534.

[8] *Macey* v. *Shurmer*, 1 Atk. 389; Amb. 520. See *Ray* v. *Adams*, 3 M. & K. 237.

[9] *Griffiths* v. *Evans*, 5 Beav. 241.

[10] See *Wright* v. *Atkyns*, 17 Ves. 255, 19 Ves. 299, G. Coop. 111, T. & R. 143; *Webb* v. *Wools*, 2 Sim. N.S. 267; *Palmer* v. *Simmonds*, 2 Drew. 225.

[11] *Wood* v. *Cox*, 1 Keen, 317; 2 My. & C. 684; *Pilkington* v. *Boughey*, 12 Sim. 114.

[12] *Macnab* v. *Whitbread*, 17 Beav. 299.

[13] *Barnes* v. *Grant*, 2 Jur. N.S. 1127.

[14] *Bardswell* v. *Bardswell*, 9 Sim. 323; *Nowlan* v. *Nelligan*, 1 B. C. C. 489; *Briggs* v. *Penny*, 3 Mac. & Gord. 546, 3 De G. & Sm. 525.

[15] *Robinson* v. *Smith*, 6 Mad. 194; but see *Lechmere* v. *Lavie*, 2 M. & K. 197.

[16] *Clifton* v. *Lombe*, Amb. 519.

[17] *Liddard* v. *Liddard*, *supra*.

[18] *Barclay's Exr.* v. *M'Leod*, 1880, 7 R. 477.

[19] *Murray* v. *Fleming*, 1729, M. 4075; *Ramsay* v. *Beveridge*, 3 Mar. 1854, 16 D. 764. It has been held that recommendations to *consider* certain persons (*Sale*, v. *Moore*, 1 Sim. 534); to be *kind* to them (*Buggins* v. *Yates*, 9 Mod. 123); to *remember* them (*Bardswell* v. *Bardswell*, 9 Sim. 319); to do *justice* to them (*Le Maistre* v. *Bannister*, Pr. Ch. 200); or to make *ample provision* for them (*Winch* v. *Brutton*, 14 Sim. 379), and trusts of that nature, are void for uncertainty.

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And it may be laid down upon English authority, which on this point is in harmony with the principles of our law,[1] that the Court will not rear up an implied trust for the purpose of carrying out a purpose of substitution. Waiving the consideration of expressions of a mere intention to benefit descendants, it is held in England that even a positive recommendation to divide property among certain persons in specified proportions,[2] or to divide and dispose of what money or property the grantee might have saved from the yearly income thereby given to him,[3] or to leave the residuary estate in a certain way,[4] is not binding on the legatee as a trust, if the power is expressly or impliedly given to him of disposing of the subject in his lifetime.[5]

Testamentary purpose: whether discretionary or imperative.

635. It has been observed that the question whether a testamentary purpose is to be interpreted as a trust or as a power is one of intention rather than of grammatical import.[6] Where a direction to dispose is a mere adjunct to a bequest of the beneficial interest in a subject, the presumption is, as we have seen, for an absolute gift of the fee, or at all events of the usufructuary interest, coupled with a power of defeating the destination. But where the fee is vested in trustees for the use of the beneficiary, it would seem that any suggestions addressed to the trustees regarding its ultimate disposal are to be regarded as directions in the nature of a precatory trust, which they are not at liberty to disregard.[7] For example, a power of altering the settlement may be exercised for the purpose of aiding the truster's probable intention, but not for the purpose of defeating it.[8] The beneficiary for whose benefit a power of appointment is granted may require the trustee to execute it.[9]

[1] *Greig* v. *Johnston*, 6 W. & S. 426, per Lord Wynford; *Brown* v. *Coventry*, 1792, M. 14,863; and cases cited in Bell's Pr. § 1878, 5th ed. § 1881.

[2] *White* v. *Briggs*, 15 Sim. 33; 15 L.J. Ch. Ca. 182. Lord Lyndhurst observed that the word "recommend" had been repeatedly held to create a trust; but that construction frequently defeated the intention of the testator, and the Court was unwilling to extend the doctrine.

[3] *Cowman* v. *Harrison*, 10 Hare, 234. "The right of a donee to spend the subject-matter of the gift is inconsistent with the nature of a trust; and the Court therefore collects in that case that there can be no intention to impose a trust."—Per Turner, V.-C., p. 239.

[4] *Eaton* v. *Watts*, Law Rep. 4 Eq. Ca. 151,—a bequest "of all my property to my husband, hoping he will leave it after his death to my son, if he is worthy of it," with an explanation of the testator's reasons. See also *Palmer* v. *Simmonds*, 2 Drew. 221.

[5] *Knight* v. *Boughton*, 11 Cl. & Fin. 513; *Huskisson* v. *Bridge*, 4 De Gex & Sm. 245. But see *contra*, *Malim* v. *Keighley*, 2 Ves. jun. 529; *Horwood* v. *West*, 1 S. & S. 387.

[6] See *Malim* v. *Keighley*, 2 Ves. jun. 531; *Meggison* v. *Moore*, 2 Ves. jun. 632, per Lord Loughborough.

[7] See *Watson* v. *Watson*, 8 March 1854, 16 D. 803, and *Dennistoun* v. *Dalgleish*, 22 Nov. 1838, 1 D. 69, where directions to pay to certain parties in liferent, and to their children in fee, were interpreted as trusts to *invest* for their behoof.

[8] *Douglas* v. *Douglas' Trs.*, 30 June 1859, 21 D. 1066.

[9] *Cowan* v. *Crawford*, 20 Jan. 1837, 15 Sh. 398; *Campbell* v. *Campbell*, 25 Feb. 1809, F.C. See *Mackay* v. *Ewing*, 10 July 1867, 5 Macph. 1004.

The Court, if a necessity arises, may define and even extend the powers of the trustees,[1] and may restrict the interest of the appointee in cases where the trustees have exceeded their powers;[2] but it does not appear that the Court has ever taken upon itself the execution of a power of appointment, or similar discretionary trust.

Trust may be constituted by way of reservation or burden upon an estate given to another person.

636. The principle that an intention manifested by a disponer is equivalent to a trust, may be further illustrated by reference to the case of a direction, in a deed of absolute conveyance, to apply the proceeds of realised heritable property in payment of legacies;[3] or of a conveyance to a party in liferent giving a virtual fee, subject to the condition that such fee shall be retained for the benefit of children of the marriage;[4] to the case of dispositions of heritage charged with payment of debts and legacies,[5] or specific provisions.[6] In all such cases a trust for payment is raised by implication in the person of the disponee, as the condition upon which the grant is to take effect in his favour. So also, if a husband has bound himself by his marriage-contract to lay out and secure a sum of money as a provision to his wife, he is, on the principle of implied trust, responsible for its investment, and can only discharge himself of the trust by investing the sum on good heritable security.[7]

SECTION IV.

Of Wills which are void for uncertainty.

Meaning of the term "uncertainty" with respect to a will.

637. It results from the analysis of this and the preceding chapter that the will of a testator who really has a testamentary intention can hardly fail for want of adequate expression. We do not set aside a will because it is informal or inofficious. It is not necessary to the validity of a will that the testator's scheme of disposition should be just or rational, or even self-consistent. A will may do violence to the rules of logic, grammar, and arithmetic, it may even (according to the late Lord President) be wanting in

[1] *Stewart* v. *Stewart*, 26 Nov. 1813, F.C.; *Muir* v. *Pollock*, 9 Dec. 1851, 14 D. 152.

[2] *Strathallan* v. *D. of Northumberland*, 20 May 1840, 2 D. 840; *E. of Rothes* v. *Rothes*, 21 Jan. 1823, 2 Sh. 135, N.E. 125; *E. of Mar* v. *Lady Erskine*, 3 Dec. 1830, 9 Sh. 126.

[3] *Fergus* v. *Fergus*, 7 Feb. 1833, 11 Sh. 362.

[4] *Ramsay* v. *Beveridge*, 3 March 1854, 16 D. 764

[5] Stair, 3, 5, 17; Ersk. 3, 8, 52; Bell's Pr. § 1775; *Robertson's Crs.* v. *Robertson*, 13 Dec. 1803, M. "Competition," App. No. 2; *Wemyss* v. *Trail*, 23 Nov. 1810, F.C.; *Ogilvie* v. *Dundas*, 22 May 1826, 2 W. & S. 214; *Sinclair* v. *Fraser*, 1798, Hume, 176; *Moncrieff* v. *Skene*, 29 June 1825, 1 W. & S. 672.

[6] *Johnston* v. *Cochran*, 13 Jan. 1829, 7 Sh. 226.

[7] *Lindsay* v. *Lothian*, 1685, M. 2269; *Hay* v. *Hay*, 1710, M. 12,982; *Ramsay* v. *Cowan*, 11 July 1833, 11 Sh. 967.

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some of the essentials of a "proposition," and yet it shall be the duty of a Court of construction to make sense of it. It is necessary, however, to consider the residual cases in which the testator has failed to express any intention at all; and the decisions in such cases deserve careful study, because it is these cases which fix the limits of the province of construction.

Case of a list of persons and sums without words of gift.

638. It has been observed before, and is at all events self-evident, that a will to be effective must have a subject and an object, and must express with respect to these a definite testamentary intention. These essentials have been considered in the three preceding sections, and it will now be shown how a will may fail through the absence of one of these essentials. Taking the three requisites in a different order, it is affirmed—

(1.) A mere signed list of persons or objects and sums of money does not constitute a will.

This is the case of *Colvin* v. *Hutchison*,[1] which came before the writer as Lord Ordinary. A proof was allowed of facts and circumstances relevant to establish that the instrument libelled was a will; and it was found in the negative, on grounds independent of the facts proved. The instrument was remarkable in this respect, that while it was entitled "Will of John Brennan," it consisted of nothing more than a column of figures with proper or descriptive names written against those figures. The Lord Ordinary observed: "It is not required by our law that a testator should make out his will according to any prescribed plan, that he should make use of any prescribed words, or that he should appoint an executor to administer his estate. But he must declare his will in writing, and it is implied in this statement of the law that he must use significant words disposing of his estate. . . . There is no objection to putting the legacies in a schedule, provided there are significant words of bequest capable of being applied to the schedule. . . . I am unable to accept a mere schedule as an expression of testamentary intention on which a Court of administration may safely act. I think that the testator's intention, if such exists, must take the form of a proposition of some kind."[2]

The judgment was affirmed in the First Division, but it is proper to notice that while the Court of review was unanimous, the Lord Ordinary's ground of judgment was made the subject of somewhat elaborate criticism by two of the four judges who took part in the decision. The writer has carefully re-read the opinions delivered in the Inner House, and compared them with his own, for the purpose of ascertaining the true ground of judgment, but the difference indicated in the opinions appears to him

[1] *Colvin* v. *Hutchison*, 1885, 12 R. 947. [2] 12 R. p. 953.

to be merely verbal, so far as the actual case is concerned; and he does not see any reason for withdrawing or modifying any of the expressions used in the passage quoted, with reference to an instrument consisting of names and figures, the relation of which to one another and to the supposed testator is unexplained.

Uncertainty as to the quantity of the estate or interest given.

639. (2.) A will may be void for uncertainty where the estate or quantity of the interest to be taken by the beneficiary is indeterminate, and the context shows that it was not intended that the beneficiary should be a universal or residuary legatee.

This was the ground of the judgment of the House of Lords in *Ewen* v. *Magistrates of Montrose*.[1] Having regard to the criticism which was made on this decision by the same Court of Appeal, differently constituted, in the case of the *Magistrates of Dundee* v. *Morris*,[2] it may be lawfully maintained that in the case of *Ewen* the principle that there can be no will without a subject of disposition was not correctly applied. But as to the principle itself there can be no question, and its application to cases which occur in ordinary practice is not attended with any special difficulties.

Bequests to an indefinite class of persons withal a power of selection.

640. (3.) A will may be void for uncertainty where the objects are not designed.[3] But as it is scarcely conceivable that a testator should frame a bequest which is blank in the name of the legatee, it is necessary to explain that the legitimate application, and, so far as the decisions show, the only known application of this rule, is to the case of bequests in favour of objects to be selected by a trustee whose death or declinature interrupts the execution of the trust. The cases bearing on this rule are stated and distinguished by the writer in the judgment delivered last year in the case of *Robbie's Judicial Factor;*[4] and the following extract expresses his views on this subject:—The opinion treats first of bequests to charities to be selected, which was the case under consideration, and separately of selection amongst individual legatees. Under the first of these heads it was said, "If I am right in defining this bequest as a bequest to charitable and religious purposes to be selected by the trust-disponees, it follows that the legacy fails by their death. The appointment of a trustee or *hæres fiduciarius*, with a power of selection, was essential to the existence of the bequest, because in the absence of such a grant of a power of selection the legacy would fail for uncertainty. The power might have been given to persons in succession; or the first acceptor or

[1] *Ewen* v. *Mags. of Montrose*, Nov. 16, 1830, 4 W. & S. 346.

[2] 3 Macq. 134, see p. 154.

[3] Sp. Ca. *Sutherland's Trs.*, 1893, 20 R. 925, residue given "to be disposed of as my trustees think proper."

[4] *Robbie's Jud. Factor* v. *Macrae*, 1893, 20 R. 358. Two other cases bearing on "uncertainty" are, Sp. Ca. *Low's Exrs.*, 1873, 11 M. 744, and *Edward's Trs.* v. *Edward*, 1891, 18 R. 535.

body of accepting trustees might have been empowered to name successors in the trust. In such a case, the elected or assumed trustees derive their authority to select the objects of the charity from the testator, and in principle their position is not distinguishable from that of the original trustees. But if we empower our factor to distribute the residue amongst charities, his authority comes from the Court, because it is quite certain that under this will no power of selecting objects of charity is given to a nominee of the Court of Session, or, indeed, to any one excepting the persons nominated by the testatrix herself.

"There may be cases where a testator has provided for the delegation of a power of selecting objects, and where from supervening circumstances the delegation cannot be carried out in the manner provided in the will. If it appears plainly that a testator did not mean to confine the selection of objects to persons nominated by himself, but only to take measures for ensuring that the selection of objects of his charity should be entrusted to competent persons possessed of the necessary local knowledge, I do not say that it would not be within the powers of the Court to supply a vacancy in such a trust."

Analysis of the cases in relation to individual legatees.

641. With reference to the case of private trusts, where, after the failure of the trustees originally appointed, the Court was asked to authorise assumed trustees or a judicial factor to exercise a discretionary power to the effect of giving an increase of interest to a beneficiary, it was observed in the same case that this had only been done in cases where the testator had provided that the power might be exercised by assumed trustees not chosen by himself. There are three cases; the first being the case of *Allan*.[1] When this case first came before the Court, the application for a direction to the judicial factor to increase the annuity payable to the truster's daughter was refused as incompetent. But on a second application, which was presented by the judicial factor himself with the consent of the other beneficiaries, the authority was granted,[2] the decision being rested on three considerations—*first*, that the testator had empowered his trustees to increase the annuity; *secondly*, that all parties having an adverse interest consented; and *thirdly*, that there were accumulations of income which, in the opinion of the Lord President, might have been claimed by the truster's daughter, as being the person entitled under the Thellusson Act to the surplus accumulations.

642. In the next case, that of *Hill's Trustees*,[3] the truster bequeathed a share of residue to the children of her daughter, and

[1] *Allan* v. *Mackay*, 5 M. 1004.
[2] 1869, 8 M. 139.
[3] *Hill's Trs.* v. *Thomson*, 1874, 2 R. 68.

Cases on powers of selection.

empowered another daughter, her sole trustee, to apportion this fund. The trust-deed did not contain a power of assumption, and the decision was that the power of apportionment was personal to the original trustees, and could not be exercised by the acting trustees, who seem to have come into office under the provisions of the Trusts Act. Lord Moncreiff in his opinion draws this distinction. He says, "Where there is a manifest *delectus personæ* and intention to entrust such a power as here to a particular person, the Court might hesitate to transfer the power to another. . . Where a discretionary power is conferred upon ordinary trustees, not implying *delectus personæ*, the Court might more readily confer these powers on new trustees." [1]

643. *Lastly*, there is the case of *Simson*,[2] where a trust was constituted in favour of trustees named, with powers of assumption in the usual form; and, in relation to the gift of an annuity to one of the beneficiaries, it was provided that the trustees should have the power of advancing the whole or any part of the capital. It was held that this was a power given to trustees for the time being, and accordingly an application at the instance of a judicial factor for authority to make an advance of capital for the purchase of an annuity for life for the beneficiary was sustained, and the authority granted. The Lord President was careful to point out that the form of the trust was such as to exclude the supposition of *delectus personæ* in relation to the original trustees.

Where a power of selection fails, legacy is void for uncertainty.

644. In the case from which this statement is taken, the claim of the judicial factor (for authority to divide a fund amongst charities) was refused, the bequest was held void because the legatees could not in the circumstances be ascertained, and the fund was declared to belong to the next of kin.[3]

[1] 2 R. 69.

[2] *Simson* Petr., 1883, 10 R. 540.

[3] Interlocutor, 20 R. 363.

CHAPTER XIX.

OF REPUGNANCY IN WILLS AND SETTLEMENTS.

1. Of Repugnancy generally.
2. Of supplying Words necessary to complete the Sense.
3. Correction of Ambiguities ("or" for "and," "survivors" for "others," &c.).

SECTION I.

Of Repugnancy generally.

In cases of repugnancy, a subsequent provision held to denote a subsequent intention.

645. Doubt is sometimes cast upon the intention of a testator by reason of repugnancy or contradiction between the different clauses or expressions of his will, though each part, taken separately, expresses a definite and intelligible purpose. To the resolution of such cases the ordinary rules of construction are evidently inadequate, and it is necessary to seek for some principle of interpretation which will authorise the adoption of the one, and the rejection of the other, of the inconsistent provisions. To avoid the necessity of sacrificing both provisions (which would be the consequence of treating the case as one of uncertainty), the rule has been admitted that where two provisions of a will are totally irreconcileable, so that they cannot possibly stand together, the last written, or that which is posterior in local position, shall be considered as indicating a subsequent intention, and shall prevail, if there is nothing in the context or general scope of the instrument which leads to a different decision: "cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est." [1] The rule is most appropriately applied to the resolution of cases of conflict between the different clauses of a will, because in such cases the position of the clauses in the instrument may with some reason be held to correspond with the order of development of the testator's intentions in point of time. The rule, however, has also been applied to cases of inconsistency in relation to expressions occurring in the same clause.[2]

Words irreconcileable with general context

646. Notwithstanding the general recognition of the doctrine of repugnancy, the cases are rare in which it is found necessary to

[1] *Morrall* v. *Sutton*, 14 L.J. Ch. 266; 1 Phill. 533, per Lord Wensleydale.

[2] *Doe* d. *Leicester* v. *Biggs*, 2 Taunt. 113, cited as authoritative in the case of *Morrall* v. *Sutton*, 14 L.J. Ch. 266, 273.

have recourse to this *ultima ratio* of decision. Indeed the sacrifice of a clause ought never to be resorted to until every attempt shall have been made by construction, and if necessary by transposition of words or clauses, to deduce a consistent scheme of disposition from the instrument. And where, of two contradictory provisions, one is consistent with the general scheme of the testator's dispositions, and the other is at variance with it, that which is consistent with the will ought to prevail, though it should be first in the order of local position. "It is clear," says Jarman, in a passage cited with approbation in a leading case,[1] "that words and passages in a will which are irreconcileable with the general context may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which may have found a place in it."

may be rejected, irrespective of their local position.

647. Of the rejection of words inconsistent with the context, we have a simple illustration in the English case of *Smith* v. *Pybus*,[2] where an annuity was left to A. "for life, and after the decease of A. to be divided equally between B. and C., to them and their heirs, or the survivor of them, *in the order they are now mentioned.*" Sir W. Grant, M.R., rejected the last words, because they had no sense or meaning; and he said the question was, whether words which had a plain meaning were to be rejected for the sake of words of which you do not see the meaning? So also, Lord Hardwicke, in the case of *Boon* v. *Cornforth*,[3] decided to reject words which had been inserted in a sentence by interlineation, and which were therefore presumably the last written, because they were inconsistent with and repugnant to the whole dispositions in the will; and his Lordship thought he had no alternative but that of rejecting these words or the entire provision.

Illustrations of the foregoing rules.

648. A case of a similar description (but which may more properly be referred to the category of transposition of clauses) is reported in the Dictionary. R. M. disponed his heritable estate, failing heirs of his body, "to and in favour of J. M. and G. M., his brother's sons, and the heirs-male to be procreated of their bodies, *which failing, to S.*" He then gave the estate to the two *nominatim* institutes, *jointly*, in unequal shares. The question was, which of the destinations regulated the succession of the share of one of

General rule further illustrated.

[1] 1 Jarman on Wills, 5th ed. 444, adopted by Coleridge, J., in *Morrall* v. *Sutton*, 14 L.J. Ch. 273.

[2] *Smith* v. *Pybus*, 9 Ves. 576.

[3] *Boon* v. *Cornforth*, 2 Ves. sen. 277.

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the institutes, who died without leaving heirs of his body. The decision of the Court was to the effect that S., the substitute, could not be served heir of provision to any part of the estate until the failure of the institutes and the heirs of the bodies of both, thereby introducing the right of accretion (which was implied in the subsequent joint disposition) into the antecedent destination.[1]

Distinction where destination in procuratory capable of being treated as supplementary.

649. But where the discrepancy in the destinations does not amount to absolute repugnancy or contrariety of meaning, the two clauses have sometimes been reconciled by holding the one to be supplementary to the other; as, for example, where the dispositive clause gave the estate to J. S., and the executive clauses were in favour of J. S. and the heirs-male of his body, this was held to be an effectual nomination of the heirs-male of the body of J. S. as heirs of provision.[2] For similar reasons a destination in a procuratory of resignation to a person *and his heirs-male* was construed as supplementary to that of the dispositive clause, by which the estate was given to the same person *and his heirs whatsoever*.[3] It may be observed that, in the last-mentioned destination, the words "heirs whatsoever" would have no legal operation except that of vesting the estate in the disponee; hence there was no positive contrariety between the clauses, and the heirs-male would come in as substitutes under the procuratory, without displacing any other class of heirs.[4]

In settlements of heritable estate, the dispositive clause held to be the ruling clause.

650. In the construction of dispositions of heritable estate, the general rule is, moreover, liable to be controlled by the operation of another general and salutary rule of construction, which is, that in the case of a discrepancy involving contrariety of meaning between the dispositive and the executive clauses of the instrument, the dispositive clause is the ruling clause in relation to the destination. This rule, and the generality of its application, are exemplified in the case of *Young's Trustees* v. *Young*.[5] Here the dispositive clause of a testamentary settlement contained a grant in favour of the testator himself and the child or children of his body, whom failing, to certain *nominatim* substitutes. The obligation to infeft was expressed directly and exclusively in favour of the persons named, and on this ground it was maintained

[1] *Sutherland* v. *Murray*, 1734, M. 14,931.

[2] *Sutherland* v. *Sinclair*, 1801, M. "Tailzie," App. No. 8. The question arose on the construction of the same settlement as in the case of *Sutherland* v. *Murray*, *supra*.

[3] *Halliday* v. *Maxwell*, 9 June 1802, 4 Pat. 346.

[4] This observation applies also to the case of *Maclauchlan* v. *Campbell*, 1757, M. 2312, where the circumstances were similar, and the decision was in favour of the selected class of heirs.

[5] *Young's Trs.* v. *Young*, 19 July 1867, 5 Macph. 1101.

that on the death of the testator without issue the persons named were entitled, without serving heirs of provision, to take infeftment as conditional institutes, in terms of the precept of sasine. But in respect that the dispositive clause conveyed the estate, in the first instance, to the testator himself, thus making him the institute, a title made up without service was held to be inhabile, and incapable of transmitting any right. The most characteristic illustrations of the rule are those in which the discrepancy between the clauses has relation to the terms of the destination. Thus, where estate was destined, by the dispositive clause, to spouses *in conjunct fee and liferent*, and to their son in fee, and in the precept of sasine warrant was granted for infefting the spouses simply *in liferent* and their son in fee, and the instrument of sasine was in terms of this precept, the fee was held to be in the father. The disposition, as regarded the father, was held to be a conveyance without precept of sasine, and the sasine taken in favour of the son vested no right in him, because the act of disposition was in favour of the father.[1] Again, where the dispositive clause of a settlement contained a destination in favour of W. P. and the *heirs-male of his body*, and one of the executive clauses was in favour of W. P. and the *heirs of his body* (which last destination would have carried the estate to heirs-general of the body), it was held that the dispositive clause overruled the other clause, and excluded the heirs-general of the body of W. P.[2]

Effect of omission in posterior grant to notice collateral right comprised in prior grant.

651. A posterior clause or destination is not to be regarded as inconsistent with a prior destination merely by reason of the omission in it of some subsidiary right previously given to another person by way of restriction of the principal grant; because such subsidiary right, if it is not expressly revoked, is effectual under the clause in which it is constituted, and is held to qualify the subsequent provisions. The principle may be illustrated by the case of legacies given in separate codicils, and which fall to be construed as if they were parts of the same testamentary writing. In a case of this nature, where a testatrix bequeathed the liferent of a fund to a lady, and the fee to her children, and by a subsequently executed codicil bequeathed the same sum of money to the children directly, without mentioning their mother's liferent, but without revoking the previous bequest, it was held that the liferent bequest was not revoked by implication, and that the subsequent legacy of the fund to the children must be taken by them subject to the burden of the liferent interest previously given to their mother.[3]

[1] *Shanks* v. *Kirk-Session of Ceres*, 1797, M. 4295.

[2] *Forrester* v. *Hutchison*, 11 July 1826, 4 Sh. 824, N.E. 831; and see *Grahame* v. *Grahame*, 20 June 1816, F.C.; 14 June 1825, 1 W. & S. 353.

[3] *Horsbrugh* v. *Horsbrugh*, 1 March 1848, 10 D. 824, 2d point.

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Under separate gifts of the same subject the grantees take concurrently.

652. Even in the seemingly irreconcileable case of separate gifts of the same subject to different persons in fee, a construction has been devised by which a testamentary operation is allowed to both provisions. In cases of this kind, the rule has been established, as explained by Lord Brougham in *Sherrat* v. *Bentley*, that the legatees shall take concurrently. "If," said his Lordship,[1] "in one part of a will an estate is given to A., and afterwards the testator gives the same estate to B., adding words of exclusion as 'not to A.,' the repugnance would be complete, and the rule would apply. But if the same thing be given, first to A., and then to B., unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in *Ulrich* v. *Litchfield*,[2] the two legatees may take together without any violence to the construction; . . . though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation." Another mode of reconciling gifts of the same subject to different persons is by treating the subsequent gift as a conditional institution in case of the failure of the antecedent gift; and very slight evidence of intention would doubtless be sufficient to support so reasonable a construction.[3]

Special devise or disposition not controlled by general; nor by words inaccurately describing it.

653. Other subsidiary rules recognised in England (where this branch of the law has been more fully elaborated than with us) may be briefly noticed. It is held that a general devise shall not, even at the expense of rendering it inoperative, be held to control a specific devise in the same instrument. A testatrix devised her lands at H. to A., and by a subsequent clause gave to B. her copyhold estates at N. and L. *and elsewhere*. Her only other copyhold estate was that previously given to A.; nevertheless, the disposition to A., although first in order, was held valid.[4] Again, a devise in clear and technical terms will not be controlled by expressions in a subsequent

[1] *Sherrat* v. *Bentley*, 2 My. & K. 165.

[2] 2 Atk. 374. The propriety of the alleged exception in the case of an indivisible chattel is questioned by the editor of Jarman on Wills, who remarks (5th ed. vol. i. 441) that, though it may seem absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention, and that the argument against it is merely one *ab inconvenienti*.

[3] See on this point (though in the events that actually occurred the clause was held to have the effect of a *substitution*) *M'Ewan* v. *Pattison*, 27 March 1865, 3 Macph. 779.

[4] *Borrell* v. *Haigh*, 2 Jur. 229; see also *Greenwood* v. *Sutcliffe*, 14 C.B. 226. In the case of *Sir T. Kirkpatrick* v. *Bedford*, 1878, 6 R. (H.L.) 4, a testator directed his trustees to pay to Roger Kirkpatrick £2000, "and to each of his brothers the sum of £1000," and bequeathed the residue of his estate to Sir Thomas Kirkpatrick and another legatee. Sir Thomas was the elder brother of Roger, and it was held by the House of Lords (reversing the decision of the Court of Session) that the gift of one-half of the residue to the former was neither inconsistent with nor in derogation of the gift of £1000 to each of the brothers of Roger, and that Sir Thomas was entitled to his legacy in addition to his share of the residue.

part of the will, inaccurately referring to the devise in terms which, if they had been used in the devise itself, would have conferred a different estate or right,—the discrepancy in such cases being presumed to arise from negligence in the transcription of the language of the preceding part of the will.[1] Nor is a bequest, or the revocation of a bequest, liable to be controlled or set aside in respect of a reason assigned for it which is untrue in fact.[2] But here a distinction is taken between the recital of a cause of granting extrinsic to the scheme of the testator's dispositions and the recital of a supposed antecedent bequest; for, as is shown elsewhere, the recital of a supposed bequest, when constituting in the mind of the testator a condition of the disposition to which it is prefixed, is equivalent to a *de præsenti* gift of the subject.[3]

SECTION II.

Of supplying Words necessary to complete the Sense.

Rule confined to cases where expression inaccurate, but clear what are the words to be supplied.

654. Where it is apparent from the language of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also apparent what are the words that have been omitted, the necessary words may be supplied by construction in order to effectuate the intention as collected from the context. The supplying words to complete the sense of a testamentary provision is a task of great delicacy, and one which Courts are generally unwilling to undertake from an apprehension of the danger of overstepping the just limits of judicial construction. The cases in which resort is legitimately had to this artifice may be reduced to a few general heads, and it is not likely that the principle will be extended to cases of a different description.

Ellipsis in a sentence supplied by transposition from the context.

655. The most obvious application of this method of construction is in the case of a palpable ellipsis in the phraseology, where the words necessary to complete the grammatical structure of the phrase are found in an antecedent or subsequent member of the sentence. Closely allied to this case, but distinguishable from it, is the case where a testator, having already provided for a certain contingency, proceeds to declare what he will do in the event of that contingency *not* occurring, but, in referring to the contingency, omits to notice some element in it. As, for example, where a legacy

[1] 1 Jarman on Wills, 5th ed. 448, citing Doe d. *Hanson* v. *Fyldes*, Cowp. 833.

[2] Jarman, *ut supra*, and cases there cited; *Grant* v. *Grant*, 9 July 1846, 8 D. 1077, and see 13 D. 805; *Speirs* v. *Graham*, 18 Dec. 1829, 8 Sh. 268.

[3] See authorities cited in Chapter XVI. (Interests arising by Implication).

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is given to certain persons *and their issue*, payable at majority or marriage, and is then given over in case any of the legatees shall die before the period of payment. Here the context shows that the destination-over is only to take effect in the event of the death of the legatee *without leaving issue*.[1]

"Die without issue:" whether the word *leaving* may be supplied.

656. It is a more doubtful question whether the words "die without issue" in a destination-over admit of being construed in the sense of dying without *leaving* issue. In one case the words were in effect so construed;[2] but more recently the Court has refused to supply the word *leaving*, and has held that a destination-over, contingent on the death of the institute without issue, is evacuated by the birth of a child, even though that child should not survive its parent.[3] It may, however, be suggested that where the words "without issue" and "without leaving issue" are used indifferently in the same destination, and apparently in the same sense, the word *leaving* may legitimately be supplied, for the purpose of giving a consistent interpretation to all the different parts of the destination.

Restoration of words deleted, where necessary to make sense of the passage.

657. Another and a more questionable application of the principle of filling up an ellipsis is found in the *Morgan* succession case,[4] where, in a bequest for the purpose of founding an hospital or eleemosynary school, the word "hospital" was deleted (apparently by mistake), and it was held that, as the bequest was insensible without the word, and as no other word had been substituted for it, the word "hospital" might be restored for the purpose of completing the sense of the passage. In a subsequent case relating to the construction of an ordinary gift, this precedent was followed, the *Morgan* case being relied on as an authority for the restoration of obliterated words when necessary to make sense of the passage.[5]

Words supplied from the context to remove a patent ambiguity.

658. Ambiguity requiring the aid of remedial construction may result from the omission on the part of the testator to state in which of two given modes he intended his estate to be divided. In a case decided in the Lords,[6] resort was successfully had to the context for the discovery of the words necessary to complete the expression of the testator's intention. The testator empowered

[1] Many instances of this *lapsus* in a destination will be found in the reported cases. The true construction is too obvious to have ever been made the subject of discussion.

[2] *Dennistoun* v. *Dalgleish*, 22 Nov. 1838, 1 D. 69.

[3] *Carleton* v. *Thomson*, 3 Macph. 514; 30 July 1867, 5 Macph. (H.L.) 151; see p. 155, per Lord Colonsay.

[4] *Mags. of Dundee* v. *Morris*, 1 May 1858, 3 Macq. 134. See *Adv.-Gen.* v. *Smith* (2d point), 1 March 1852, 14 D. 585.

[5] *Chapman* v. *Macbean's Trs.*, 10 Feb. 1860, 22 D. 745.

[6] *Brodie* v. *Brodie*, 26 March 1817, 6 Pat. 270.

his trustees *to divide* the residue of his funds and personal estate among his spouse, his three sons, and his three youngest daughters (naming them), "*the division to run thus, as nine to ten;* that is to say, for every ten pounds that shall fall to the share of *each* of my sons, my spouse and three youngest daughters shall be nine." The question was, whether for every ten pounds drawn by each son the wife and daughters were to draw nine pounds each, or only nine pounds among them as a class. The Court of Session adopted the latter, the House of Lords the former construction,—and upon what appears a satisfactory ground, namely, that the introductory part of the bequest announces a purpose to make a division amongst individuals, which is equivalent to a division *per capita*, and that what follows is only for the purpose of pointing out the proportions in which the objects of this individual division are to take, and ought to be interpreted in conformity with that purpose. Hence the bequest was construed as if it read, "the *shares* of my spouse and three youngest daughters shall be *nine pounds each*."[1]

Suppressed alternative supplied where required by the structure of the sentence.

659. There is yet another class of cases in which the construction may be aided by the insertion of additional words without subjecting the will to a conjectural or arbitrary interpretation. We refer to cases in which the testamentary provision is in an alternative form, but one of the alternative cases is suppressed, the means of supplying it being furnished by the context. Thus, where a testator devised an estate A. to his sister "for life, or, if she should come into possession of an estate B.," then over, it was held that, in order to render the sentence complete and sensible, the devise might be read as a gift to the sister for life; *and, after her death, or* if she should come into possession of the other estate, then to the person substituted.[2] Here the fact of the estate being given for life only clearly showed that the death of the tenant for life was the alternative event, the omission of which was indicated by the position of the word "or." On a somewhat similar principle, it was held by Sir J. K. Bruce, V.-C., that a bequest to children, to be divided "on their attaining their respective age or ages of twenty-one years if sons, or if daughters on their marriage respectively," might be read as if it had been "or, in the case of daughters *marrying earlier*, upon marriage;" so that the legacy should be payable at majority or marriage, whichever of these events should first happen.[3]

Accumulative expressions read disjunctively.

660. To this rule of construction the case of *M'Gowan* v. *Jaffray*[4] may be assimilated (though it may also be viewed as a case

[1] See the terms of the judgment, 6 Pat. 281, and the observations of Lord Eldon at the preceding page of the report.

[2] *Doe* d. *Leach* v. *Micklem*, 6 East, 486.

[3] *Lang* v. *Pugh*, 1 Y. & C. C. C. 718.

[4] *M'Gowan* v. *Jaffray*, 20 July 1842, 4 D. 1546.

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of implication from a recital). A husband, by his antenuptial contract, gave to his wife in liferent certain small portions of his heritable property, and also an annuity payable out of his general estate. He then assigned and disponed "his whole subjects, heritable and moveable, *generally and particularly before described*," pertaining or that should pertain to him at his death, to the children of the marriage equally among them. There was no previous general description of heritable subjects, and no description of moveable subjects. The heir-at-law claimed the heritable estate, other than the subjects specially described, maintaining that the conveyance to the children of the marriage was limited to those subjects. It was clear, however, from the language of the clause of disposition, that the granter meant to make two dispositions,—a general one and a special one; and it was accordingly held that the words in italics ought to be read as a separate gift of the subjects particularly described, and not as a qualification of the antecedent disposition of the general heritable and moveable estate. This construction requires the insertion of the word "including" before the disposition of subjects "generally and particularly before described."[1]

Case where "moveable" supplied after "heritable" in a codicil.

661. In *Clouston's Trustees*[2] a truster gave to each of three daughters (in the form of a direction to trustees) a one-fifth share of the residue of his estate, "the said shares to be at the absolute disposal of my said three daughters respectively." By a codicil he revoked and altered the settlement "to this extent, that in place of the absolute power therein given (to his three daughters) I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half, none of them shall have power to deal with it during their respective lifetimes, beyond the interest or revenue derived from it," &c. It appeared from the context of the codicil that the testator intended to deal exhaustively with the shares given to his daughters under the will, and as these shares included moveable as well as heritable estate, the necessary emendation of the codicil was supplied by implication.

Result of the authorities on the supplying substantive words in settlements.

662. It must always be remembered that nothing can justify the insertion of words to fill up a blank in a will or settlement but the assurance that those words, and no others, are the words

[1] We do not enter here on the consideration of a class of cases of which the case of *Ker* v. *Innes* (5 Pat. 320) is a good example, where the words "heirs-male" were construed "heirs-male of the body." Such are not properly cases of supplying words to clear up an obscurity in the text, but are instances of proper construction of technical language. Such cases must be sought for in other parts of the work, under the special subjects to which they have relation.

[2] *Clouston's Trs.* v. *Bulloch*, 1889, 16 R. 987.

which the testator inadvertently omitted. This assurance would seem to be attainable only (1) where the words proposed to be supplied are found in the immediate context, and in a connection which necessitates their repetition; or (2) where, as in some of the later entail cases, a word or syllable is awanting, and the reading suggested is the only one that will give a sensible meaning to the passage.[1] It is not enough that there is only one reasonable or usual mode of completing the passage, for the testator may have intended to make an unusual or unreasonable disposition.[2] In the *Hoddam* entail case,[3] a whole line was left out in the transcription of the irritant clause of the entail, evidently by a clerical error, the effect of which was that there was no subject to which the irritancy declared by the clause could be applied. The passage, if restored according to the correct style of such clauses, would have contained the words "debts, deeds, and acts,"—words which, if introduced into the deed in the proper connection, would have made a valid entail. But as there was no assurance that the granter knew how to make a valid entail, or intended to make one, and as in many similar cases deeds of entail had been declared ineffectual for no other reason than the omission or imperfect expression of what was here proposed to be supplied, it was justly held by the House of Lords, upon the advice of Lord Brougham, that the blank could not be filled up in the way proposed, and consequently that the entail was invalid.

Of supplying words of relation.

663. Allied to this subject is the question (involving in some cases the supplying of appropriate words of relation) whether conditions or other explanatory clauses are properly applicable to one only, or to a series of antecedent provisions. Of this question we have a simple example in the case of *Erskine* v. *Williams*,[4] where

[1] *Norton* v. *Stirling*, 14 D. 944; 22 May 1855, 2 Macq. 205; *Glassford's Tr.* v. *Glassford*, 7 July 1864, 2 Macph. 1317; *Holmes and Campbell* v. *Cuninghame*, 13 Feb. 1851, 13 D. 689.

[2] Still less is it permitted to supply words in one provision for the sake of uniformity with provisions in favour of other persons similarly related to the testator, or similarly dealt with in his will in other particulars. The case under consideration must not be confounded with that of a hiatus in a settlement consequent on the physical destruction or wearing away of the paper on which the instrument is written. This is not a question of construction, but a question as to the tenor of what was actually written. In a recent case of this sort, the Court refused to allow the insertion of words to make a clause of absolute warrandice, because it could not be known whether the warrandice actually undertaken was absolute, or was from fact and deed only. But where words rendered illegible by abrasion occur in a clause of style not admitting of variation in meaning, we should imagine that there would not be the same difficulty in supplying the omission, and that the case would be held to be within the rule, *omnia presumuntur rite et solemniter acta*.

[3] *Sharpe* v. *Sharpe*, 18 April 1835, 1 S. & M'L. 594. See this case cited, *infra*, Chapter XXVII., Section II.

[4] *Erskine* v. *Williams*, 14 Dec. 1843, 6 D. 226.

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a settlor having undertaken by antenuptial contract to make certain provisions for the younger children of the marriage in the event of his succeeding to the whole of certain estates, or to any part of his said estates *of the yearly value of* £3000 *or upwards*,—the question arose whether his representatives were bound to pay, seeing that the value of the *whole* estate was less than £3000 per annum. It was held that they were liable, because the proviso making the payment conditional on the succession being of a certain value was, in strict construction, applicable only to the event of the granter succeeding to a part of the estate; and, as the context showed that he did not contemplate the possibility of the estates being worth less than £3000 in the aggregate, it was improbable that he should have intended the proviso to apply to that contingency.

Proviso introduced parenthetically applies to proximate member of sentence: *secus* where embodied in substantive clause.

664. An explanatory provision, when introduced in the form of a parenthesis, or contained in a participial clause, is generally understood to apply to the immediately antecedent or subsequent member of the sentence. And conversely, the introductory words "declaring," "providing," and "always" (which are generally used in the sense of *resuming* the subject from its commencement), have the effect of making the proviso in which they occur qualify the whole series of provisions which precede or follow it. This construction is exemplified by the cases upon clauses in tailzied destinations intended to prevent the division of the estate. Thus, where an entailer disponed his estates to his son and the heirs-male of his body; whom failing, the heirs-female of his body (the eldest always succeeding, to the exclusion of heirs-portioners, throughout the whole course of the succession); whom failing, to other heirs,—the proviso was held, regard being had to its form and position in the sentence, to apply only to the antecedent branch of the destination; and heirs-female, designated in a subsequent branch of the destination, were found entitled to take concurrently as heirs-portioners.[1] A clause excluding the succession of heirs-portioners, and declaring that the *eldest heir-female* shall succeed without division, if it is introduced at the close of the destination, is *prima facie* applicable to the whole series of substitutions, and will even regulate the succession of daughters who are not called as "heirs-female," but as *nominatim* substitutes.[2]

Illustration of rule from cases on the application of fetters to prohibitions of entail.

665. Reserving for consideration in another chapter a class of cases in which the most refined criticism has been brought to bear upon the doctrine of the application of declaratory provisions to an antecedent series (we refer to the question of the application of the

[1] *Mowat* v. *M'Culloch*, 6 Feb. 1823, 2 Sh. 186, N.E. 166.

[2] *Swinton's Tr.* v. *Swinton*, 10 Jan. 1862, 24 D. 278.

fetters of an entail to the prohibitory clauses), we shall at present confine the illustration of the doctrine to a special case, where an irritancy was held to be effectual by supplying words of relation, obvious though not expressed in the passage. It may be premised that, with the exception of this case, irritant clauses in the form "all which (or such) debts and deeds are hereby declared to be null," have uniformly been held bad, on the principle that the relative expression "such debts and deeds" has for its antecedent the last member of the prohibitory clause, which, according to the customary style, is directed against debts and deeds whereby the estate may be adjudged or evicted.[1] In the case of *Hay* v. *Hay*,[2] however, the words of the irritant clause were "all *which* debts, *facts*, and deeds," &c.; and the question of the validity of the clause depended on the construction to be given to the expression *which facts*. The word *facts* did not occur in any of the prohibitory clauses, so that, according to the strict grammatical construction of the words of the irritant clause as they stood, there was no antecedent to which the relative expression "which facts" would apply. But the phrase being clearly elliptical, and it being clear what were the facts to which the irritancy was intended to be applied, the proper construction was given to the irritant clause by supplying the word "prohibited" after "facts," which was thus made to denote facts of the prohibited description, in accordance with the obvious intention.

SECTION III.

Correction of Ambiguities ("or" for "and"; "survivors" for "others"; Numerical Errors, &c.).

Limits of the subject.

666. Under this title it is proposed to indicate briefly the nature and operation of some of the more violent remedial measures which are occasionally applied to testamentary instruments, such as the transposition of words and members of a sentence, the correction of errors in dates, numbers, and nomenclature, and the inversion of the meaning of conjunctive and disjunctive particles. The authorities, for the most part, are discussed in other parts of the work, in connection with the special subjects to which they respectively belong; and the purpose of the present notice is to generalise the results obtained from the separate discussion of cases which are governed by common principles of construction.

[1] *Baillie* v. *Baillie* (Mellerstain), 12 D. 1220, and other cases cited in Chapter XXVII., Section II.

[2] *Hay* v. *Hay* (Rannes), 20 Dec. 1842, 5 D. 347.

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Rule that clause, senseless in its actual position, may be transposed.

667. It has been laid down that where a clause or sentence, otherwise senseless or contradictory, can be rendered consistent with the context by being transposed, a Court of construction is warranted in making the transposition.[1] To the general proposition stated in these terms no objection can be taken; but the cases must be rare indeed in which a phrase, totally devoid of meaning in the connection in which it stands, can be rendered sensible, and consistent with the probable intention, by transposition. Accordingly, it will be found that the cases to which Mr. Jarman refers, in illustration of this doctrine, are either simple cases of misnomer in which a double mistake has been committed (*i.e.*, putting A. for B., and B. for A.), or cases where the transposed member of the sentence really had a meaning (it may be an *unreasonable* meaning) in the position in which it stood in the will, and where, therefore, the rule was not properly applicable.[2]

Doctrine of transposition criticised: transposition essentially a conjectural remedy.

668. A clause may, of course, be legitimately read into or construed as part of a prior or subsequent clause, in virtue of proper words of reference incorporating it with that clause; as in the case where a testator dispones his estates to A. and the heirs of his body, and in a subsequent part of the deed gives the estate over to B. in the event of A. dying without issue.[3] Here the substitution is incorporated by reference with the primary disposition; and the transposition implied in reading the clauses in connection with each other is only an expansion of the meaning expressed by the words of the will as they stand. The kind of transposition with which we are at present concerned is one which is not required either by the grammatical construction, or by the effect of words of reference, but is simply a conjectural restoration of the text of the will, by transposing its words. This is obviously a very hazardous remedy, because the same words may, by a series of transpositions, be made to express a great variety of meanings, of which not more than one can possibly be the genuine meaning of the testator. In almost all cases of insensible provisions, whether in wills or deeds, the cause of the obscurity is either the accidental omission of material words, or the interpolation of words extraneous to the sense of the passage; and, in the last-mentioned case, it would appear that the safer course is to reject the extraneous expression altogether, rather than to place it in a different part of

[1] 1 Jarman on Wills, 5th ed. 465, and authorities there cited.

[2] The case of *Doe* d. *Alcock*, 1 B. & Ald. 137, is, as pointed out by the learned author, a palpable instance of the misapplication of the rule, the effect, if not the motive of the transposition, being simply to substitute a probable and reasonable for an unreasonable but distinctly expressed scheme of disposition; see Jarman, *ut supra*.

[3] *M'Ewen* v. *Pattison*, 27 March 1865, 3 Macph. 779. See the Lord Justice-Clerk's observations on this point, p. 795.

the sentence, where, indeed, it may have a meaning, but a meaning never contemplated by the testator.

Correction of errors in dates, numbers, and nomenclature: mistranscription or misnomer.

669. Errors in relation to dates, numbers, and nomenclature are of two kinds,—errors of transcription, proved to be such by the correct name or number being found in other parts of the deed; and cases of misnomer or miscalculation on the part of the testator. The correction of errors of the former class involves no peculiar principle of construction. Numerical errors, the result of misapprehension or forgetfulness on the part of the testator (or assumed to be so, from the deed containing no evidence to the contrary), are in general only important when they relate to the quantity of the estate or interest disposed of, or to the number of a class of persons who are the objects of the disposition. Errors or ambiguities in the specification of the contents or value of an estate[1] do not affect the disposition, if the estate is given as a whole and is sufficiently identified. Where a testator gives a greater number of articles than he possesses, the construction is given by the principle of the *legatum rei alienæ*. Where the articles are *scienter legatæ*, the testator's representatives are under an obligation to purchase them or to give an equivalent. The subject of errors and ambiguities in the specification of the number of persons of a class is treated in connection with destinations to children;[2] and the question of the identification of the subject and objects of a gift when erroneously or insufficiently described, which (except in the case of proved errors of transcription) always depends on evidence extrinsic to the deed, is discussed in the preceding chapter.

Changing words: cases where new meaning suggested by the context.

670. Another mode of restoration of a defective text remains to be noticed, which consists in the substitution of one word for another, or—which is the same in effect—the giving to a word a meaning different from its received meaning. We do not enter here on the construction of words of flexible meaning, or on the rule so frequently applied, that if in one part of a deed the meaning of a word is clear, and in another part of the deed it is doubtful, the doubtful passage is to be interpreted according to the meaning in the passage that is not doubtful.[3] A large portion of this work is devoted to the exposition of the construction of terms descriptive of persons, as heir and institute, executors and next of kin, children and issue, daughter and heir-female; or of things, as heritable and moveable, fee and liferent, estate, interest, and the like. Here we are concerned only with the construction of words in a non-natural sense, either for the purpose of giving effect to intention deduced

[1] *Erskine* v. *Williams*, 14 Dec. 1843, 6 D. 226; *Dewar* v. *Kirk-Session of Torryburn*, 13 March 1864, 2 Macph. 910.

[2] Chapter XXXVIII., Section I.

[3] See the rule stated in *Dick* v. *Drysdale*, 14 Jan. 1812, F.C. (p. 465).

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from the tenor of the instrument, or for the purpose of making sense of a phrase which, as it stands in the deed, is insensible. Of such a construction deduced from general intention we have an example in the case of *Houston* v. *Nicolson*,[1] where an estate being settled on Lady Houston, as institute, and certain heirs of tailzie and provision, it was declared "that the said Lady Houston, *her heirs of tailzie*, shall have power, each of them, to provide their respective husbands and wives in a competent liferent out of the foresaid estate," and it was held that this power might be exercised by the institute.

Words not to be changed unless devoid of a sensible meaning.

671. The principle according to which words may be changed for the purpose of giving a sensible meaning to the passage, and the limits of its application, may be deduced from a comparison of the cases of *Eglinton* v. *Montgomerie*[2] and *Norton* v. *Stirling*.[3] In the *Bourtreehill* case, the objection to the deed of entail was, that the prohibition against alienation was directed against the act of selling, alienating, &c., "either *redeemably* or under reversion." It was argued that the common form was "irredeemably or under reversion," and that the omission of the negative particle "ir" was a patent clerical error. But it was held in the Court of Session, and afterwards in the House of Lords, that there was no such incongruity or absurdity in the prohibition of redeemable sales as would entitle a Court to alter the language; that a sensible meaning was attributable to the phrase, and that the construction proposed was not admissible for the purpose of converting the word "redeemably" into "irredeemably." In *Norton* v. *Stirling*, the objection was that the irritant clause, as engrossed in the Register of Tailzies contained the introductory words, "In case the said J. S. &c., shall fail *to* neglect or obey or perform the said conditions or provisions or any of them," instead of "shall fail *or* neglect." This error was held to be remediable by construction; first, because there were words in the antecedent part of the sentence directed against contravention; and secondly, and chiefly, because the expression "fail to neglect" was insensible as it stood, and because there was only one way of correcting the mistake so as to make sense of the passage, namely, by substituting the word "or" in the place of "to." The case was contrasted with that of *Hoddam*,[4] as to which it was observed that there were twenty ways in which the blank in the sense of the deed might be filled up, and a Court could not undertake to fill up the blank in a way that would constitute a valid entail.[5]

[1] *Houston* v. *Nicolson*, 1756, M. 2338, referred to and treated as authoritative in the case of *Erskine* Petr., 2 Feb. 1850, 12 D. 649.

[2] *Eglinton* v. *Montgomerie* (Bourtreehill case), 7 D. 425, and 9 D. 1167; 8 July 1847, 6 Bell, 136.

[3] *Norton* v. *Stirling*, 14 D. 944; 22 May 1855, 2 Macq. 205.

[4] *Sharpe* v. *Sharpe*, 1 S. & M'L. 549.

[5] 2 Macq. 213-215.

"Or" changed into "and" to avoid doing violence to the meaning.

672. But the most characteristic example of the restoration of a passage by substituting one word for another, is the changing of "or" into "and" in contingent destinations, in cases where violence is done to the meaning by the negligent use of the disjunctive particle. The cases are of this nature: Where a disposition or bequest is made contingent on the occurrence of either of two events (as in the case of provisions payable at majority or marriage) the grantee will necessarily acquire a vested interest if only one of the conditions is purified, *e.g.*, if he attain the years of majority, though without being married. The proper alternative to the condition of such a destination is, that *neither* of these events should happen; and accordingly, where there is to be an ulterior destination contingent on the failure of the first, the contingency must be expressed *so as to negative both the specified events*,—*e.g.*, in the case supposed, the destination-over would only take effect consistently with the primary destination, in the case of the institute dying without attaining majority, AND without being married. But by a confusion of thought, the language of the antecedent is sometimes echoed in the subsequent clause, and the testator is made to give over the fund in the event of the institute dying without attaining majority OR being married, the effect of which (if literally construed) would be to deprive the institute of the vested interest previously given, and to make the gift contingent as long as he remains unmarried. In order to reconcile the several parts of the destination, the rule of construction was established at an early period in the history of this branch of the law, that, in such cases, the word "or" should be changed into "and."

Death "without attaining majority *or* being married."

673. The case of *The Earl of Home* v. *Bothwell*, in which the principle was first recognised, is thus reported by Elchies:[1] A bond of provision to a brother and two sisters was payable at their mother's death, or their own majority or marriage, whichever of them should first happen, provided that if either of them died before marriage *or* majority, the one-half of their portion should accresce to the survivors. One of them long survived the age of twenty-one, but died before marriage, and therefore the Lord Ordinary found that the substitution still subsisted, because she died before one of these events, viz., marriage. "But," says the learned reporter, "we altered the interlocutor, and thought that the particle "or" was here meant *conjunctivé*, and that marriage alone would have put an end to the substitution, though she had not been major; and,

[1] *Earl of Home* v. *Bothwell*, 1747, Elch. "Provisions to Heirs," No. 11; M. 2989. The same construction of the word "or," in the case of a contingent or executory limitation-over has been established in England, and on the same ground. The cases are fully discussed in 1 Jarman on Wills, 5th ed. 470.

for the same reason we found that her majority determined it, though she was not married."

Construction established by the House of Lords in *Grant* v. *Dyer*.

674. The construction here recognised was not uniformly adhered to, and was only finally established by the judgment of the House of Lords in *Grant* v. *Dyer* [1] where the point was raised on the interpretation of a bequest to the testator's son, payable on his arriving at the age of thirty-one, or being married, but declared to fall into the residue if he should die under thirty-one *or* unmarried; and it was held (reversing the judgment of the Court below) that the legatee took a vested interest on his attaining the specified age, though unmarried—the word "or" in the gift over being allowed to be read as if it were "and."

Death "within year and day, *or* without heirs procreate."

675. The case of *Campbell* of Jura,[2] which is commonly cited as an authority for the conjunctive construction of the word "or," is not so easily brought within the rule which authorises the conversion of words to obviate obscurity or inconsistency in a testamentary provision. In this case it was provided by a contract of marriage "that, if the marriage dissolved within year and day after the solemnization thereof *or* without heirs procreate and existing of the same," then the tocher should return to A. C., the wife's father. A son was born of the marriage, but he predeceased his mother, who died after the marriage had subsisted for two years. It was held, chiefly, as may be inferred, on the ground of the improbability of the condition being intended to operate during the whole period of the marriage, irrespective of its duration, that the tocher did not return; the condition being read as if it were applicable to the contingency of the dissolution of the marriage within year and day, *and* without a child existing at the period of dissolution.[3]

[1] *Grant* v. *Dyer*, 1813, 2 Dow, 73. On the general construction of the word "or," see the judges' opinions in *Lawson* v. *Stewart*, 4 Sh. 388, N.E. 390. The mistake of using the word "or" for "and" in a destination-over, contingent on the failure of the institute without attaining majority, and without being married, occurs in many modern settlements, of which we have noted three instances among the reported cases; but in none of them was there any notice taken of the peculiarity. The cases are *Campbell* v. *Reid*, 12 June 1840, 2 D. 1084; *Wright* v. *Ogilvie*, 9 July 1840, 2 D. 1357, see p. 1358; and *Stewart* v. *Stewart*, 17 July 1851, 13 D. 1387. In the last of these cases, the destination-over was made contingent on the death of the truster's children in minority *or without children surviving them*, words which would prevent the institutes from ever taking a vested interest, since it could not be known until their respective deaths whether any of them would be survived by his or her children. Such cases suggest to conveyancers the importance of attending closely to the meaning of words in that most difficult province of their art, the drafting of contingent destinations.

[2] *Campbell* v. *Campbell*, 1757, M. 2991.

[3] Compare this case with the earlier decisions in *Baillie* v. *Somerville*, 1677, and *Nicolson* v. *Oswald*, 1712, M. 2987, where the strict, and, as we think in these cases, correct construction of the conjunction was allowed to prevail. This construction was followed in an unreported

Examples of the conjunctive construction of "or."

676. The conjunctive construction of the word "or" has also been admitted, merely in respect of the general intention and presumed object of the provision in many decided cases in the English Courts, of which one example may be given—referring to Mr. Jarman's work for a fuller exposition of the development of this branch of jurisprudence. This was the case of a devise to a person for life, subject to the condition that, if he should intermarry with any woman not having a competent fortune, *or* without the consent of trustees, the estate should not vest. The devisee married a woman with a competent fortune, but omitted to obtain the consent of the trustees, and it was held that the estate vested upon the performance of either part of the condition.[1]

Case where "and" was construed disjunctively.

677. Allied to these cases is one in which the word "and" was read disjunctively. Two brothers, *pro indiviso* proprietors of heritable estate, executed a mutual trust-settlement. One of the brothers was married and had children, the other was unmarried. By one of the clauses of the mutual settlement, it was provided that in the event of other children being born to the first-mentioned truster, "*and* in the event of (the second trustee) being married and leaving issue," a different division of the estate should be made. The first truster had another child, the second truster died unmarried. It was held that the child who was born after the date of the settlement was entitled to participate in the division of the estate, although, on a strict reading of the settlement, his right to participate was dependent on the double event of his birth *and* the marriage of his uncle, the second truster.[2]

Cases where "survivors" was construed as including "other" legatees.

678. As to the extension of the meaning of the word "survivor," it is scarcely possible in the present state of the authorities to say what is the law of Scotland on the subject. The case to be considered is of this nature. A testator wishing to make a complete family provision begins by declaring that on the death of any of the objects his share shall fall to his children or issue, and then proceeds to say that in case of the death of any of the objects without issue, his share shall be divided amongst *the survivors or their issue*, meaning that it shall be divided amongst the survivors of the original objects, and the issue, if any, of those who may die before the distribution. Sometimes the direction is to divide the share amongst *the survivors and the issue of predeceasing legatees.* If literally interpreted, the words printed in italics in the first case exclude from participation the issue of an object whose death was antecedent to that of the one whose share is to be divided; and, in

case of *Murray's Exrs.* v. *Murray*, 31 Jan. 1868, where a destination-over, in case of the legatee marrying without the consent of *curators*, was held by the Court to be limited in intention to the period of minority.

[1] *Long* v. *Dennis*, 4 Bur. 2052.

[2] *Dunlop* v. *M'Crae*, 1884, 11 R. 1104.

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the second case, the literal interpretation excludes the issue of an object whose death was subsequent. There have been two cases of the first type before the First Division of the Court, and in both cases the word "survivor" received its ordinary signification, it being recognised, however, that an extended meaning might be deduced from slight indications in the context.[1] Then there are two Second Division cases in which the word "survivor" has received the extended meaning, simply because the Court was satisfied that the testator meant to provide completely for all the events.[2] Lastly, there is the case of *Aberdein*,[3] where the extended meaning was in any view the true meaning, because the gift over to charities was only to take effect in the case of the failure of all the objects or institutes without issue. It seems desirable that the question should again be considered, with the view of settling the law on this subject on definite lines.

[1] *Forrest's Trs.* v. *Rae*, 1884, 12 R. 389; *Ward* v. *Lang*, 1893, 20 R. 949; and see *Hairstens' Factor* v. *Duncan*, 1891, 18 R. 1158.

[2] *Ramsay's Trs.* v. *Ramsay*, 1876, 4 R. 243; *Paterson's Trs.* v. *Brand*, 9 Dec. 1893, 31 S.L.R. 200.

[3] *Aberdein's Trs.* v. *Aberdein*, 1870, 8 M. 750.

CHAPTER XX.

OF EXTRINSIC EVIDENCE IN EXPLANATION OF TESTAMENTARY WRITINGS.

1. Evidence for the purpose of enabling the Court to read the Will.
2. Evidence for the purpose of identifying the Persons and Things named in the Will.
3. Where the Words of the Will are insensible with reference to Extrinsic Circumstances.
4. Proof of the Testator's knowledge of Facts material to the Construction of the Will.
5. Evidence in disproof of the Presumption against Double Provisions.
6. Where the Words of the Will are indifferently applicable to more than one Person or Thing.
7. Proof of Completed Testamentary Intention.

679. The present chapter is confined to an exposition of the rules of law which determine the conditions under which extrinsic evidence is received in aid of the interpretation of testamentary instruments. It has been justly observed that the subject is only a branch of the general system of rules which have been established for the correct interpretation of wills, and that its application can only be properly understood when it is treated in subordination to the system of which it forms a part.[1] The present work, however, is to a large extent devoted to an exposition of the principles of construction in their application to principles of testamentary succession; and it will not be necessary to interrupt the course of the present discussion by the consideration of questions pertaining to the general doctrine or principles of construction.[2]

Division of the subject.

680. The admissibility of extrinsic evidence in aid of the interpretation of wills depends (as is implied in the statement of the question) upon the special purpose for which it is proposed to be adduced. The cases in which such evidence is competent and admissible may be thus classified: (1) For the purpose of enabling the Court to Read the Will; (2) For the purpose of Identifying the

[1] Wigram on the Admissibility of Extrinsic Evidence, 4th ed. p. 9.

[2] It has also been considered expedient not to embarrass the discussion with illustrations drawn from the law of interpretation of contracts, as to which the question of the reception of extrinsic evidence is liable to be affected by a variety of elements (*e.g.*, usage, onerosity, *rei interventus*) which do not enter into the consideration of the questions in relation to wills. On the subject of contracts, reference is made to Dickson on Evidence, 2d ed. pp. 140-170.

persons and things named in the Will, and especially those which are the Subjects or the Objects of the disposition; (3) For the purpose of giving a Special Meaning to the words of the Will, in cases where these words (if taken in their strict and primary sense) are *insensible* with reference to extrinsic circumstances; (4) For the purpose of proving the Testator's Knowledge of material facts, where, by any rule of law, such knowledge is a legitimate element of construction; (5) For the purpose of supporting a bequest in contradiction to the presumption against Double Provisions; and (6) For the purpose of proving the Particular Intention, where the will contains words of description which are applicable indifferently to more than one person or thing;[1] (7) To these a seventh head may

[1] For convenience of reference, we here transcribe the Seven Propositions of Sir James Wigram, V.-C., upon which the theory of exposition of that eminent author is founded. The work, it need scarcely be added, has attained a very high degree of authority, and its conclusions have in the main been accepted by the legal profession. The propositions are as follows:—

"1. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case, the sense in which he thus appears to have used them will be the sense in which they are to be construed.

"2. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

"3. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

"4. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

"5. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subjects of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words.

"6. Where the words of a will, aided

be added,—Evidence to prove completed intention, in other words, for the purpose of establishing that the document propounded is in fact the testator's last will, or a part of it. Such evidence, according to the practice of the Courts of Scotland, may be taken in an action or suit brought for the purpose of interpreting the will, in which, of course, it precedes all other inquiries.

SECTION I.

Evidence for the Purpose of enabling the Court to read the Will.

(1) Transcription; (2) Translation; (3) Explanation of terms; (4) Explanation of foreign law.

681. For this purpose the Court may require—(1) a correct transcript of the will into legible characters; (2) a translation of it; (3) an explanation of terms of art used in it; and (4) an exposition of any rules of foreign law affecting its interpretation. Information of this description is evidence of the contents of the will.

Words illegibly written, or obliterated.

682. (1.) Transcription of the will may either be of the whole, as where it is written in a foreign character, or of particular words which are either illegible, or erased, or written in cypher. Evidence of what the characters are or were, or of what they denote, will be admitted according to circumstances. We select an illustration applicable to each of the cases. In *Goblet* v. *Beechey*,[1] the testator, who was a sculptor, bequeathed to the plaintiff "all the marble in the yard, the tools in the shop, bunkers, *mod.* tools for carving," &c.; and the question was, whether the syllable *mod.*

by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended; and the will (except in certain special cases,—see Proposition 7) will be void for uncertainty.

"7. Notwithstanding the rule of law, which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, Courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined; where the object of a testator's bounty, or the subject of disposition (*i.e.*, the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

The *first* proposition is a rule of construction introductory to the subject, but not necessarily belonging to it. The *second* and *third* are correlative propositions, and are comprehended in our third subdivision. The *fourth* proposition corresponds to our first, and the *fifth* to our second subdivision. The *sixth* and *seventh* propositions, again, are correlative, and correspond to our sixth subdivision. Our fourth and fifth subdivisions are not the subject of separate discussion in the work of Sir James Wigram.

[1] *Goblet* v. *Beechey*, 3 Sim. 24; Wigram, App. 187, 189.

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(which was at the end of a line, and apparently part of an unfinished word) denoted *models*, which were works of art of considerable value, or was to be read in conjunction with the next word, as "modelling tools." In the original codicil, the letters *mod.* were followed by a small mark, which was alleged by the one party to be the letter "s," and by the other to be a hyphen, or the letter "g." Sir John Leach, V.-C., remitted to the Master to inquire what the testator intended by the word in question, with power to call to his assistance persons skilled in the art of writing, and also persons who had a competent knowledge of tools and articles used in statuary.[1] In *Glassford's Trustees* v. *Glassford*,[2] it was objected to a deed of entail that the last two letters of the word *dispone*, in the prohibitory clause, were written on an erasure, without their being noticed in the testing clause. The Lord Ordinary remitted to a skilled engraver, who reported that the letter "n" was written on an erased surface, and that through this letter "n" an "s," which previously filled the space, might be easily traced, thereby establishing the fact that the word originally written was the word "dispose."

Wills written in cypher: evidence to prove the meaning of the characters.

683. Of the admission of evidence for the purpose of reading expressions written in cypher we have an example in the case of *Kell* v. *Charmer*.[3] A will contained the following bequest:—"I give and bequeath to my son William the sum of *i. x. x.*; to my son Robert the sum of *o. x. x.*" The numerical symbols were written in pencil in the original will, but were included in the probate. It appeared that the testator had carried on the business of a jeweller, and had in the course of his business used certain marks or symbols to denote prices, &c. Sir John Romilly, M.R., admitted extrinsic evidence to prove that, according to the system of notation used by the testator, the letters *i. x. x.* and *o. x. x.* represented the sums of £100 and £200.

Will in foreign language read through the medium of proved translation: probate of such wills.

684. (2.) A will expressed in a foreign language is read by the Court through the medium of a proved translation. In Scotland, the Commissary or Sheriff confirms either the original will, or an official copy issuing from a court in which it has previously been proved; and, in either case, the will, if expressed in a foreign language, must be accompanied by a translation into English. The practice of the English Court of Probate differs from ours in regard to translations. Probate is not granted of an original will in a foreign language, but of a translation only. Where probate is sought of an English will, previously proved in a foreign jurisdiction (through

[1] Wigram, App. 196.

[2] *Glassford's Trs.* v. *Glassford*, 7 July 1864, 2 Macph. 1317.

[3] *Kell* v. *Charmer*, 23 Beav. 195.

the medium of a translation), two courses are open. Where the Court is asked to grant an ancillary administration on the footing that the will has been recognised as valid by the foreign court, a re-translation of the translation so recognised must be produced; but where probate is sought of the document, not as having been recognised by the foreign court, but as being valid by the law of the foreign country, it proceeds upon a certified copy of the original will.[1]

Translation issuing from Court of Probate: whether binding on a Court of construction.

685. A translation of a will, even when issuing from a Court of Probate, is not binding on a Court of construction, if the accuracy of the translation is impugned by a party.[2] And where conflicting evidence is laid before a Court as to the meaning of an expression in a foreign will, the Court must determine the meaning for itself, by examining the reasons assigned by the witnesses, as in any other case of conflicting evidence upon matter of opinion. In such a case, if the judge is conversant with the foreign language, his knowledge of its construction will of course enable him the better to appreciate the reasons assigned for the different readings, or he may obtain from books or private sources the information necessary to enable him to weigh the conflicting opinions.[3]

Evidence in explanation of the meaning of terms of art.

686. (3.) The reception of evidence in explanation of the meaning of terms of art is matter of daily practice in actions upon contracts. It is of course equally admissible where such terms occur in a will.[4] And, in a question as to the meaning of an ancient deed, the Court will look at other deeds of the period in order to explicate its phraseology.[5]

687. (4.) Reference is made to the introductory chapter on In-

[1] In the goods of *Deshais*, and in the goods of *The Countess de Vigny*, 34 L.J. Pr. 58.

[2] See the case of *Enohin* v. *Wylie*, *infra*. In a question of *the construction of a law* expressed in a foreign language, the Judicial Committee of the Privy Council proceed as far as possible on their own knowledge of the language, under reference to dictionaries or works of authority. See, for example, *Sérendat* v. *Saïsse*, Law Rep., 1 P. C. Ap. 152, and *Adv.-Gen.* v. *Bruneau*, *id.* p. 169, on appeal from the Mauritius.

[3] Thus, in the course of the argument on the construction of a phrase in a will in the Russian language, the question being whether two substantives were both governed by the preposition "in," the Lords Justices in Chancery inquired of a gentleman in court conversant with the language whether there was a word in the original corresponding to "in," and whether the two nouns were both in the same case, and both governed by the preposition. Upon the information thus obtained, their Lordships expressed themselves as being satisfied that the passage had been correctly translated; *Enohin* v. *Wylie*, 29 L.J. Ch. 344, 346.

[4] *Goblet* v. *Beechey*, 3 Sim. 24, where evidence was taken as to the meaning of the terms "bunkers" and "models," part of the apparatus of a sculptor's establishment.

[5] *Ker* v. *Innes*, per Lord Eldon, 5 Pat. 425, where his Lordship observed that he looked at a deed (being one of those referred to in the argument) not as being connected with the history of the case, but to see *what was the Scottish law language of the period*.

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Evidence of foreign law: function of construing the will not to be delegated.

ternational Law for a statement of the conditions under which resort may be had to foreign law in the interpretation of a will, and of the effect to which evidence of the foreign law is received by the Court of construction.[1] For the present purpose it is sufficient to state that, according to the latest and most authoritative *dicta*, the function of construing the will is always to be exercised by the Court, not delegated to counsel; and the opinions of counsel learned in the law of the foreign country are only received for the purpose of informing the Court of the rules of law applicable to the construction of the testamentary instrument, and to enable the Court to put a proper construction upon the instrument.[2]

688. The duty of a Court of construction in relation to the interpretation of a foreign instrument is thus summarised in the leading opinion in the case of *Di Sora* v. *Phillips*:[3] "Where a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist, of the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction."

SECTION II.

Evidence for the purpose of identifying the Persons and Things named in the Will.[4]

Identification of the subjects and objects of the testamentary disposition.

689. This kind of evidence is most usually resorted to for the purpose of ascertaining the particular persons who are interested under the will, and the particular things which are the subjects of disposition. The rule which admits such evidence is, however, not confined to the case of the identification of the subjects and objects of the grant; and it is clear that where a person or thing is even

[1] *Supra*, Chapter II., Section VIII.

[2] *Campbell's Exrx.* v. *Clinton's Trs.*, 22 June 1866, 4 Macph. 858. This was the method of construction followed by the House of Lords in two English cases of great importance, *Enohin* v. *Wylie*, 10 H.L. Ca. p. 1, 31 L.J. Ch. 402, and *The Duchess Di Sora* v. *Phillips*, 10 H.L. Ca. 624, 33 L.J. Ch. 129. Any doubt which may have been entertained as to the province of a Court of construction in such questions must yield to the unanimous opinion of the judges constituting the Court of appeal in the latter case.

[3] 10 H.L. Ca. 633, per Lord Cranworth. And see the more elaborate opinion of Lord Chelmsford in support of this view, pp. 636-642.

[4] For the cases subsequent to 1868 falling under this section, reference is made to Chapter XVIII., Sections I. and II., on the interpretation of words descriptive of the objects and subject of a will or bequest.

incidentally referred to in a will, it must be competent to inquire whether there be *in rerum naturâ* a person or thing answering to the description, and to admit evidence of such surrounding circumstances as are necessary to make the allusion in the will intelligible. But as a bequest is certain where the subject given and the person to whom it is given are ascertained, every question of identification may, for practical purposes, be treated as having relation either to the subject or to the object of the disposition.

Imperfect designation rendered certain by evidence of extrinsic circumstances.

690. A person or thing is evidently only then correctly and sufficiently designed when the words of the will (without any knowledge on the part of the reader of the person or circumstances of the testator) are sufficient to distinguish such person or thing from all others; as in the case of a legacy to the clergyman of a certain parish when there is only one such parish, or of a disposition of a house in a certain town, described by the street and number of the street, or by reference to a map. Such designations obviously do not give rise to questions of identification. A designation may, however, be so defective as not to indicate any particular person or thing to one who is ignorant of the circumstances of the testator and his family, but may be rendered definite and certain by evidence of those circumstances; in which case the maxim applies, *id certum habetur, quoad certum reddi potest.* Or, again, a designation may be so inaccurate as, *prima facie*, to indicate a different person or thing from the one intended, and yet the true meaning may be rendered certain by evidence connecting the testator with the subject of the designation.

Extension of the rule to general designative words.

691. These observation are applicable to general and collective words of designation as well as to individual names. Words descriptive of classes of persons, or even of relationship, have different meanings assigned to them in different countries. A legacy by a Scotsman to establish an "hospital" was sustained as a trust for founding an educational institution;[1] the same term used in the will of an Englishman would be understood to apply to an establishment for the cure of diseases. A bequest in favour of "godly persons," and "godly preachers of Christ's holy gospel," receives an interpretation in conformity with the religious persuasion of the testator.[2] So also in the case of estate,—the word

[1] *Mags. of Dundee* v. *Morris*, 1 May 1858, 3 Macq. 134.

[2] *Shore* v. *Wilson* (*Lady Hewley's Trust*), 9 Clark & Fin. 355. On this principle, also, where any dispute arises as to the proper administration of a trust for purposes of a benevolent or religious character, the Court will inquire into the religious tenets of the society with which the trust is connected, and will, if necessary, declare what the doctrines of the society are, and whether they have been adhered to; *Davidson* v. *Aikman*, 16 Nov. 1803, M. 14,592 (interlocutor); and cases cited *infra*, Chapter LIII, Section II.

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"stock" will receive a different interpretation according as the testator is a merchant, a farmer, or a fund-holder; "books," according as he is an author, a publisher, or a collector; "jewels, clothes," &c., according as he is a wearer or a vendor of the articles. Accordingly it has become an established rule of interpretation that, for the purposes of identification, the Court may inquire into every material fact relating to the person who claims to be interested under the will, to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs,[1] The kind of evidence upon which a Court of construction will proceed is best illustrated by the cases which have occurred in practice.

Identification of the person or object of the grant: effect of misnomer or misdescription.

692. (1.) Confining our attention in the first place to the identification of the persons or subjects of the disposition, we begin with the simplest case, the identification of an individual grantee. Where the name is correctly given, but the designation is defective, the identity of the claimant with the person designed in the will usually admits of being established by circumstances connecting the claimant with the testator. Errors of spelling, the omission of one of the legatee's Christian names, &c. are disregarded,[2] and more material errors of nomenclature are removed by evidence of circumstances accounting for the mistake.[3] The principle is illustrated by a case where a legacy bequeathed to "Janet Keiller or Williamson, confectioner in Dundee," was claimed by Agnes Keiller, widow of Wedderspoon, who had been a confectioner in Dundee. This person had a sister, Janet Keiller, married to a seaman named Whitton, residing in Broughty-Ferry, near Dundee, and the trustees of the settlement brought an action for determining which of them had right to the legacy. Janet Keiller did not claim. Agnes Keiller or Wedderspoon founded her claim on the circumstance that in five previously executed wills, with eight codicils (which were all holograph), found in the truster's repositories, she was named Keiller, and designed confectioner in Dundee, being described in one as "Janet Keiller, confectioner in Dundee;" in another as "Keiller, spouse to Wedderspoon, confectioner in Dundee;" while, in a third, a legacy was left to "Helen Smith, whom Mrs Wedderspoon takes the charge of," and it was proved that the claimant had been in the habit of corresponding with the

[1] Wigram, p. 65 (Proposition 5).

[2] *Morton* v. *Hunter*, 26 Nov. 1830, 4 W. & S. 379; *Maclaine* v. *Maclaine*, 16 June 1852, 14 D. 870; *Adv.-Gen.* v. *Lord Forbes*, 1 Feb. 1751, 1 Pat. 482. But the Court will not admit extrinsic evidence for the purpose of proving that an erasure in a proper name in a tested will was made at the request of the testator, and for the purpose of correcting a misnomer; *Reid* v. *Kedder*, 24 June 1834, 12 Sh. 781.

[3] *Keiller* v. *Thomson's Trs.*, *infra*.

testator, and receiving money from him for behoof of Helen Smith. The claimant being thus identified as the person described in these various wills and codicils, it was suggested, in explanation of the misnomer, that the clerk who copied out the trust-deed had erroneously transcribed *Williamson* instead of Wedderspoon from the holograph wills; and the Court adopted the suggestion, being "clearly of opinion that no other person could be meant except the claimant.[1] In a subsequent case arising out of the same succession, a legacy to "William Keiller, confectioner in Dundee," was claimed by William Keiller, confectioner in Montrose, and by James Keiller, confectioner in Dundee; but William having withdrawn from the competition, the Court preferred James, being satisfied that he was the person to whom the legacy was given. It appeared that James was a relation of the testator, and had been intimate with him; that he was the only confectioner of the name of Keiller in Dundee; and that William Keiller had never been a confectioner there, and had not been a confectioner at all until a few months before the death of the testator.[2]

Illustrations of the rule as followed in England.

693. In illustration of the media of identification we shall here introduce two of the best known of the numerous English cases on the subject. In *Beaumont* v. *Fell*,[3] the testator gave a legacy of £500 to Catherine Earnley. No person of that name, but one Gertrude Yardley, claimed the legacy. By the proofs it appeared that the testator's voice, when he made his will, was very low and hardly intelligible; that the testator usually called the claimant "Gatty," which the scrivener who took instructions for drawing the will might easily mistake for Katy; and that the said scrivener not well apprehending the name, the testator directed him to J. S. and his wife to inform him, who afterwards declared that Gertrude Yardley was the person intended. It was moreover proved that the testator in his lifetime had declared that he would do well for her by his will. The Court considered that in this case the name only was mistaken; and that it was very material that no such person as Catherine Earnley claimed the legacy, which, together with the proofs already mentioned, was sufficient to entitle the plaintiff to the legacy.

694. In *Still* v. *Hoste* a testatrix bequeathed the sum of £100 "unto Sophia Still, the daughter of Peter Still, of Russell Square." Peter Still had only two daughters, named respectively Selina and

[1] *Keiller* v. *Thomson's Trs.*, 15 Dec. 1824, 3 Sh. 396, N.E. 279.

[2] *Keiller* v. *Thomson's Trs.*, 16 June 1826, 4 Sh. 724, N.E. 730. Mr. Dickson expresses a doubt whether the descriptions were not so erroneous as to be irremediable, and suggests that the Court in effect made the bequest which the testator intended, but failed to express (Law of Evidence, § 208).

[3] *Beaumont* v. *Fell*, 2 P. Wms. 140.

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Mary Ann. The attorney who made the will and another proved that Selina was the person meant, and the case was referred to the Master by the Vice-Chancellor, with a declaration of his opinion that Selina was the person entitled to the legacy.[1]

Ascertainment of persons answering to a general *designatio personarum*.

695. Where legacies are given to individuals under a general *designatio personarum*, evidence is, of course, admissible to prove that a claimant is one of the persons answering the description. As in *M'Intyre* v. *Fairrie's Trustees*,[2] where a person claiming the benefit of a legacy to each of the testator's domestic servants who should be in his service at the time of his death was allowed to prove that she had taken charge of the place of business of a firm of which the testator was a leading partner, had served him daily with his luncheon there, and was in the habit of assisting at his residence when there was company. On these *indiciæ* the claimant was found to be a domestic servant within the meaning of the bequest, and to be entitled to the legacy.

Grantee designed by a pseudonym or nickname.

696. In other cases, evidence has been admitted to prove that the testator had habitually called a certain person by a peculiar name, which he had introduced into his will. The case of *Lee* v. *Pain*,[3] decided by Sir J. Wigram, V.-C., is an example. A bequest to "Mrs and Miss Bowden, of H., widow and daughter of the Rev. Mr. Bowden," was claimed by Mrs. and Miss Washbourne, widow and daughter of a dissenting clergyman of that name. The claim was sustained on proof that Mrs. Washbourne's maiden name was Bowden, that the testatrix had been intimate with her family, that she had been in the habit of calling the claimants by the name of Bowden, and on the mistake being pointed out, had acknowledged it.

Identification of societies and corporations and their office-bearers. Effect of misnomer.

697. Bequests to societies constituted for religious or benevolent purposes, or to official persons as trustees for such purposes, not infrequently give rise to questions of identification which fall to be determined by extrinsic evidence under similar conditions to those which obtain in relation to the identification of individuals. A partial misnomer will not vitiate the bequest, and evidence is admissible to account for the error; as in the case of an appointment of the "Moderator of the *City* of Aberdeen" (instead of *Synod* of Aberdeen) as a trustee for certain charitable purposes.[4] A bequest, however, may be so inaccurately worded as to create a doubt which of two existing societies, similar in their names and functions, is entitled to the money. The case of the *Scottish Mis-*

[1] *Still* v. *Hoste*, 6 Madd. 192; Wigram, pp. 119-121.

[2] *M'Intyre* v. *Fairrie's Trs.*, 12 Nov. 1863, 2 Macph. 94.

[3] *Lee* v. *Pain*, 4 Hare, 251.

[4] *Synod of Aberdeen* v. *Dr. Milne's Trs.*, 25 Feb. 1847, 9 D. 745.

sionary Society was of this nature.[1] A legacy to "The Scottish Missionary Society of the Established Church" was claimed by the Scottish Missionary Society, which was not specially connected with any religious denomination, and by the Home Mission Committee of the General Assembly of the Church of Scotland. It appeared that, some time prior to the date of the will, the testatrix had been in the habit of subscribing to the funds of the Scottish Missionary Society; that it was the only Society answering to the terms of the leading designation, that its purposes were those of a missionary society, namely, the dissemination of the Christian religion in heathen countries, that the Society included among its members and officers some of the leading ministers and laymen of the Established Church, and that the testatrix was cognisant of the names and objects of the General Assembly's missionary schemes, as shown by her having left a legacy to one of them under its proper appellation. The judges being all of opinion that the legacy denoted an individual object, and not merely a general intention, it was held that the claimants representing the Mission or Scheme of the Church of Scotland were not entitled, because, 1*st*, the name of that scheme did not at all correspond with the name or designation in the will; 2*d*, the purposes of that scheme (home missions) did not correspond with the proper character of a missionary society; and 3*d*, the testator had given another legacy to the scheme under the name of the Home Mission, which made it improbable that she meant to give this legacy to the same object under a totally different designation. It was further held that the Scottish Missionary Society was entitled, and that the bequest was not void for uncertainty, because, 1*st*, the correct and complete name of the society was set forth in the bequest, which was a strong point in its favour; and 2*d*, the false or erroneous description, "of the Established Church," was unimportant, as it did not destroy the identification, and merely brought the case within the well-known rule of *falsa demonstratio*.[2]

Effect of assumption of a new name, where bequest given to a society under its original name.

698. A society, secular or religious, may change its name, either as a result of amalgamation with kindred societies, or to make the name correspond with some extension of the objects of the society, or of the area of its operations. In such a case, and notwithstanding changes both of name and of organisation, a legacy to the society under its original name will be good, and may be claimed by the society under its assumed name,—the elements of continuity

[1] *Scottish Missionary Society* v. *Home Mission Committee of the Church of Scotland*, 19 Feb. 1858, 20 D. 634. And see the claims of the *Irish Charter School Society*, and *Society for Promoting Christianity among the Jews*, in *Sommerville's* case, 8 Sh. 370; *Gordon's Hospital* v. *Ministers of Aberdeen*, 8 July 1831, 9 Sh. 909.

[2] Per Lord Neaves, 20 D. 641-2.

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of title and identity of purpose being proved to the satisfaction of the Court.[1]

Ascertainment of societies or institutions answering to a general designation.

699. In other cases, bequests to societies are given in terms which clearly are not intended to apply to a specific society known to the testator, but to a society or societies answering the description, if such exist. The case of *Duff's Trustees* v. *Societies of Scripture Readers*,[2] is an instance of such a *designatio societatum* arising under two legacies contained in different codicils. By the first the testator bequeathed "to the Societies of Scripture Readers," in nine towns therein named, the interest of his Peninsular East India Railway funds. By the subsequent writing the testator left a sum of money to the constituted authorities of certain towns for similar purposes. The two bequests being found by the Court to be distinct, the case was remitted to the Lord Ordinary to dispose of the claims under the first bequest, and an interlocutor was pronounced finding that there were societies answering the designation in only four of the nine towns named, and these were accordingly preferred to the extent of four-ninths of the sum bequeathed.[3]

Identification of the subject of disposition.

700. (2.) The identification of the subject of disposition is governed by the same rules in relation to evidence and the effect of erroneous and imperfect designations, as in the case of identification of a person or object. A description, though incorrect in some particulars, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so for the purposes of identification,—as where a false description is superadded to one which, if standing alone, is correct. "Thus, if a testator devise his *black* horse, having only a white one,[4] or devise his *freehold* houses, having only leasehold houses,[5] the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases, the substance of the subject intended is certain, and if there be but one such substance, the superadded description, though false, introduces no ambiguity; and as by the supposition the rejected words are inapplicable to any subject, the Court does not

[1] *Pringle* v. *M. of Tweeddale*, 16 Dec. 1823, 2 Sh. 588, N.E. 505; *Sommervail* v. *Edinburgh Bible Society, et al., infra* (Scottish Missionary Society's claim).

[2] *Duff's Trs.* v. *Societies of Scripture Readers*, 19 Feb. 1862, 24 D. 552; claim of the Irish Schools in *Sommervail's* case, 22 Jan. 1830, 8 Sh. 370.

[3] Interlocutor, 24 D. 557, note.

[4] *Door* v. *Geary*, 1 Ves. sen. 255; Touch. 432.

[5] *Day* v. *Trig*, 1 P. Wms. 286; *Doe* d. *Gunning* v. *Lord Cranstoun*, 7 M. & W. 1. But where a testator devised "all that *freehold* farm, called the Wick Farm, in Headington, containing 200 acres or thereabouts," it was held by Sir J. L. Knight-Bruce, V.-C., that 12 acres of leasehold property, part of the said farm (which consisted of 202 acres), did not pass; *Hall* v. *Fisher*, 1 Coll. C. C. 47. The ratio of the judgment was, that as there was a *freehold* subject answering the description, there was no room for the application of the doctrine of *falsa demonstratio*.

alter, vary, or add to the effect of the will by rejecting them. To such cases the maxim *falsa demonstratio non nocet* may with propriety be applied; and this is the proper limit of that maxim." [1]

Evidence for identification may relate either to the document of title, or to the estate.

701. The identification of a subject of disposition may either have reference to a document of debt or other security, where there is a reference to writings in general terms,[2] or it may relate to the determination of specific personal,[3] or real or heritable estate.[4] And in a question as to whether certain lands are subjected to the fetters of an entail, it is clearly competent to resort to extrinsic evidence for the purpose of showing that the lands in question are possessed as part or pertinent of an estate which is described by a general name in the instrument creating the entail.[5] The identification of lands passing under a given description, or, as it is termed, the question of parcel or no parcel, is most commonly and properly determined by evidence showing what was possessed under antecedent deeds of title containing the same or a similar description of subjects. In a case of this kind, a grant of leasehold estate described the subject as consisting of certain lands therein named, extending to about 200 acres, "and the village of Scartnaglowrane," and part of W. and T., containing by estimation 140 acres. On appeal to the House of Lords on a bill of exceptions, it was held that evidence of possession was rightly admitted to show that 1700 acres of mountain land had been enjoyed as part of the village of Scartnaglowrane, and was comprised in the term village, and passed by the grant,—"village" being held to be capable of such a construction.[6] In this case the principle was severely tested; but, considering the loose way in which descriptions of heritable estate are put together, it must be admitted that possession is the only reliable exponent of the meaning of the terms of which they consist.

[1] Wigram on Extrinsic Evidence, 4th ed. p. 68.

[2] *Panton* v. *Gillies*, 22 Jan. 1824, 2 Sh. 632, N.E. 536; *Melvin* v. *Nicol*, 20 May 1824, 3 Sh. 31, N.E. 21; *Inglis* v. *Harper*, 18 Oct. 1831, 5 W. & S. 785.

[3] *Duff's Trs.* v. *Societies of Scripture Readers*, 19 Feb. 1862, 24 D. 552 (question as to East India Railway stock).

[4] *Donald's Trs.* v. *Donald*, 26 March 1864, 2 Macph. 922; and see *Logan* v. *Wright*, 2 April 1831, 5 W. & S. 242; *Stewart* v. *Feryuson*, 27 Feb. 1841, 3 D. 668.

[5] *Earl of Stair* v. *King*, 6 D. 821; 30 April 1846, 5 Bell, 82; *Earl of Leven and Melville* v. *Cartwright*, 12 June 1861, 23 D. 1038.

[6] *Waterpark* v. *Fennel*, 7 Cl. (H.L. Ca.) 650. The case is valuable for the general expositions contained in the opinions of the Judges as to the principles upon which parole evidence may be admitted. In these opinions a general concurrence is expressed in the views embodied in Vice-Chancellor Wigram's propositions.

SECTION III.

WHERE THE WORDS OF THE WILL ARE INSENSIBLE WITH REFERENCE TO EXTRINSIC CIRCUMSTANCES.

Secondary meaning may be inferred from circumstances, where words are otherwise insensible.

702. The rule now to be stated is confined in its application to cases where the evidence, which is always admissible for the purpose of identification, fails to disclose any person or thing (as the case may be) answering to the words of the will in their strict and primary acceptation. In such a case the words so construed are said to be *insensible* with reference to extrinsic circumstances, there being no external object to which they can be applied. But as a testator is always supposed to contemplate real persons and things in the expression of his testamentary wishes, it is presumed, in the case under consideration, that the words are used in some popular or secondary sense of which they may be susceptible. For the purpose of giving a *real meaning* to the words which create the difficulty, it is apparent that the Court must have the power of inquiring whether there are any extrinsic circumstances suggestive of a sense in which the words may be applied to some actual person or thing, and of determining the construction accordingly.

Where a real object exists answering to the primary meaning, evidence of secondary meaning not admitted.

703. The converse of this rule of law, namely, that words which, in their primary meaning, represent real persons or things, cannot have a different meaning impressed upon them by extrinsic circumstances, is a self-evident proposition, and requires no authority to support it.[1] It may, however, be illustrated by the familiar rule of construction, that words descriptive of the legal order of succession, as "heir," "next of kin," &c., are not to be bent from their natural meaning by considerations of intention deduced from the circumstances of the testator or of the alleged disponee. Such words *always* have a real meaning, because every person necessarily has an heir-at-law and a personal representative, the Crown being entitled to succeed failing heirs of the testator's blood or kindred. Among the many questions involved in the decision of the case of the *Earl of Selkirk* v. *Douglas*,[2] this instructive ruling will be found in the final interlocutor:—"Find that from the legal import of the clause 'heirs and assigns whatsoever,' in the late Duke of Douglas his contract of marriage, A. D., as heir of line, is called to succeed to the said Duke in that part of his estate claimed by the Earl of Selkirk; and that the *parole evidence* offered by the Earl of Selkirk, to the effect of giving a different meaning to the said clause,

[1] These propositions are discussed in Wigram, pp. 42-60.

[2] *Earl of Selkirk* v. *Douglas*, 27 March 1779, 2 Pat. 449.

is not competent." [1] The interlocutor containing this finding was affirmed on appeal. In the cases in which a flexible meaning has been given to terms descriptive of heirs, such as the *Roxburghe* and *Linplum* cases, it will be found that the reasons for the adoption of the special meaning are drawn exclusively from the terms of the settlement, with the necessary assumption of an actual pedigree and estate to which the destination is to be applied.[2]

Secondary meaning given to *designatio personarum* where there are no objects: "Children" read "grandchildren."

704. The cases in which the rule under consideration is legitimately applied are those relating to the construction of general words of designation where there are no real objects precisely answering to the designation. Thus, in the case of a legacy to the children of A., where A. has no children either at the date of the will or afterwards, but at the date of the will he has a grandchild, who survives the testator, the rule in question authorises the reception of evidence of these facts for the purpose of finding an object, namely, the grandchild in question, to whom the designation will apply in a secondary sense.[3] On this principle, where a legacy was given *to each of the three daughters* of a person named, and there were four daughters in existence at the date of the will, who all survived, the bequest being uncertain (and therefore insensible) with reference to the actual circumstances of the family, evidence was admitted, upon which the Court was enabled to construe the words as importing a legacy of the prescribed amount to each of the daughters.[4]

Whether illegitimate child would take under a designation, if there were no lawful issue.

705. One of the most important applications of the principle (resting, meanwhile, exclusively upon English authority) is found in the rule according to which a bequest to the *existing* children of a person named receives effect in favour of illegitimate children, where there never were lawful children existing to whom the words of the will could apply. The most distinct case is that of a bequest to the children of a person deceased who never had any legitimate children.[5] The principle has been carried one step farther in the much canvassed case of *Gill* v. *Shelley*.[6] The question was as to meaning of a bequest of residue to be divided amongst certain classes of persons, "amongst whom," said the testator, "I include *the children of the late* Mary Gladman." Mary Gladman had *only* one legitimate child, whose representatives accordingly laid claim

[1] 2 Pat. 465.

[2] Chapter XXIV. (Destinations to Heirs of Provision).

[3] See observations on this point in Chapter XXXVIII., Section I., distinguishing this from the case of *Rhind's Trs.* v. *Leith*, 5 Macph. 104, where there were children existing, and grandchildren were (in accordance with this rule) excluded from participation in the bequest.

[4] *Bogle* v. *M'Lehose*, 28 Feb. 1815, Hume, 274.

[5] 2 Jarman on Wills, 5th ed. 1082, *infra*, Chapter XXXVIII., Section I.

[6] *Gill* v. *Shelley*, 2 Russ. and Mylne, 336; and see observations in Wigram, pp. 58-60.

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to the provision. Charlotte Shelley, an illegitimate child, born before marriage, claimed an equal share of the provision as *one of the persons* designated by the words of the gift. It was maintained that the bequest to Mary Gladman's children was one in favour of a plurality of objects, and that as no state of circumstances ever existed or could arise with reference to which the testator could have used the word "children" in its proper sense, as confined to lawful issue, a case was presented in which evidence of the use of the word, in the sense of including a natural child, might be sought in the surrounding circumstances. This argument prevailed, and it was decreed that the claimant Charlotte Shelley, though illegitimate, was entitled to a share in the distribution of the residue jointly with the representatives of the legitimate child.

"Estate" shown to apply to subjects of power.

706. Under this rule also, a bequest by a testator of all "my" estate of a particular description is held to apply to estate of which he has the power of disposal, if he had no such estate in property.[1]

SECTION IV.

Proof of the Testator's knowledge of Facts material to the Construction of the Will.

Evidence of knowledge not generally admissible to invalidate the grant; *secus* in relation to identification.

707. Wherever facts of family history, facts connected with the identification of the objects of the will, or the estate which the testator possessed or professed to dispose of, are competently before the Court, it would seem that evidence of the testator's knowledge of those facts is also competent. But it is only in exceptional cases that inferences drawn from the testator's knowledge of such facts can be called in aid of the construction of a will. Thus, to put a somewhat crude case, it would not be legitimate, in a question whether a large estate or a small one was intended to pass, to give any weight to the fact that the testator was on friendly terms with the heir or competing claimant of the larger estate, and that he knew very little of the legatee, to whom, on the ground of relationship, the particular subject was left. The view acted on by the Court was thus expressed by the late Lord President in a case where the parties had been somewhat liberal in their admission of extrinsic facts and writings: "Anything in the nature of a declaration of intention, or any statement of the testator from which an inference can be drawn, subsequent to the execution of his testa-

[1] Wigram, pp. 19, 57, and authorities cited. By the English Wills Act, 1 Vict., cap. 26, § 27, general devises of real estate, and general bequests of personal estate, operate as executions of powers of appointment, unless a contrary intention shall appear from the will. This appears to be the rule of common law in Scotland.

mentary papers, appears to me to be quite inadmissible. On the other hand, we are entitled to inquire into the facts affecting the position of the testator at the time when he made his settlement, and also at the time when he made his codicil. We are entitled to know, for example, what was the amount of his estate at each period *according to his own estimate*, because considerable light may be thus obtained in ascertaining his intention as expressed in his testamentary writings, under reference to the fact that his estate was of greater or less value at one period and at another."[1] Moreover, evidence of the testator's personal acquaintance with the legatee, or knowledge of his name, designation, fortune, &c., appears to be admissible for the purpose of identification, *e.g.*, in the case of a misnomer or insufficient description of the legatee.[2] And, as was seen in treating of the construction of inconsistent and ambiguous provisions, a legacy or provision cannot be rejected because of a false reason assigned for it, even though it is capable of proof that the testator was misinformed in regard to the matter of fact.[3] A will may be reduced on the ground of essential error on the part of the testator; but the error must be one affecting the identity of the object of the bequest, or of the subject or estate, and such cases are not likely often to arise.[4]

Legacy to "my husband" held void where marriage invalid by reason of bigamy.

708. In *Kennell* v. *Abbott*,[5] a testatrix gave a legacy to a man whom she described as "*my husband* Edward Lovell," supposing him to be in fact such, whereas at the time of his marriage with the testatrix he had a wife living. The legacy was disputed on the authority of a text of the Civil Law,[6] and on the ground of error caused by the fraud of the legatee. Sir R. P. Arden, recognising the principle embodied in this text, held that the legacy was void. His decision, he observed, was not to be understood as determining the case where, from circumstances not moving from the legatee himself, the description was inapplicable, as where a person is erroneously supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it. But, he continued, "this is a legacy to the lady's supposed husband, and under that name. He was the husband of another person, and had

[1] *Free Church Trs.* v. *Maitland*, 1887, 14 R. at p. 388, and see the observations of the same Judge in *Glendonwyn* v. *Gordon*, 8 M. at p. 1082.

[2] See *Bogle* v. *M'Lehose*, Hume, 275.

[3] *Grant* v. *Grant*, 9 July 1846, 8 D. 1077.

[4] In the case last mentioned an issue of fraud was granted, and one of essential error refused, 8 D. 1078.

[5] *Kennell* v. *Abbott*, 4 Ves. 802.

[6] "Falsam causam legato non obesse, verius est, quia ratio legandi legato non cohæret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse;" Dig. lib. 35, tit. 1, l. 72, § 6.

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certainly done this lady the grossest injury a man can do to a woman. . . . Under these circumstances, I am warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy."

Knowledge of the parties an element in the construction of marriage-contracts.

709. In the construction of marriage-contracts and settlements evidence as to the knowledge possessed by the parties of facts affecting their rights under the contract or settlement appears to be admissible.[1]

Knowledge in case of *legatum rei alienæ*.

710. There are, moreover, cases in which the efficacy of a bequest is, by a rule of positive law, made to depend on the knowledge possessed by the testator of material circumstances, and where, accordingly, evidence of such knowledge is admissible. Thus, in the case of *legatum rei alienæ*, the legacy is valid if the testator knew that the thing was the property of another, and is equivalent to a gift of the value of the thing. Evidence of the testator's state of knowledge as to the ownership of the subject of the legacy is then necessary, relevant, and admissible.[2]

711. To this head also may be referred the subject of the admissibility of extrinsic evidence to prove an intention on the part of a testator that a specific estate should *not pass* or be affected by his general disposition. But the question of the admissibility of evidence for such a purpose cannot be usefully discussed except in connection with the law as to evacuation of special by general conveyances, and, to avoid repetition, reference is made to the separate chapter on this subject.[3]

SECTION V.

Evidence in Disproof of the Presumption against Double Provisions.

Distinction between admitting evidence

712. The question of the admissibility of extrinsic evidence in cases as to the effect of double legacies or provisions, is one of

[1] *Forlong* v. *Taylor's Exrs.*, 15 Sh. 126, 3 April 1838, 3 S. & M'L. 177; per Lord Cottenham, C., p. 210; per Lord Jeffrey in *Davidson* v. *Mags. of Anstruther Easter*, 7 D. 351. The Court has even gone the length of authorising the correction of a erroneous destination, which had been introduced into a deed collateral to a marriage-contract, on proof that it was contrary to the agreement of the parties; *North British Insurance Co.* v. *Tunnoch*, 1 Nov. 1864, 3 Macph. 1. But see *contra*, *Stewart* v. *Stewart*, 10 Aug. 1842, 1 Bell, 796.

[2] *Cranston* v. *Brown*, 1674, M. 8058; *Catto* v. *Gordon*, 1748, M. 8076, 8077; Elch. "Legacy," No. 15.

[3] Chapter XXV.

in support of duplication, and in opposition to it (contradictory of the will).

some nicety. In relation to double legacies, the general rule is, that both are payable, unless where the second legacy impliedly revokes the first, or is a mere repetition of it.[1] This rule being, not a presumption of law, but an inference arising from the terms of the will, it follows that evidence of the testator's declarations is not admissible to contradict the will, by proving an intention to give the one provision in substitution for the other.[2] An early decision of the House of Lords allowing such evidence must be considered erroneous, and would not now be regarded as a precedent.[3] On the other hand, the inference drawn from the identity or similarity of the two bequests, to the effect that only one of them is intended to take effect, is a presumption of law rather than a rule of construction; and it would appear that evidence extrinsic to the testamentary writings is admissible to show that the testator intended to give two legacies, on the principle that evidence is competent in support of the will, but not in contradiction to it.[4] Upon this principle the Court, in one case, took into consideration circumstances showing that in the interval between the execution of the two deeds the testator's affection for the legatee had increased, while he had no predilection for his heir-at-law;[5] and evidence showing that the testator's fortune had increased is admitted as throwing light upon the intention.[6]

English authorities.

713. An important authority on this subject is the opinion of Sir John Leach in *Hurst* v. *Beach*,[7] who, after observing that the authority of the Civil Law was in favour of the reception of the evidence, proceeded to say: "Our primary principle is, that evidence is not admissible to contradict a written instrument. In some cases, Courts of equity raise a presumption against the apparent intention of a testamentary instrument. And there they will receive evidence to repel that presumption; for the effect of such testimony is, not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed. Thus, where the Court raises the presumption

[1] See Chapters XL. and XLI. (Legacies, whether Cumulative, &c., and Satisfaction of Legacies).

[2] Per Lord J.-C. Hope in *Horsbrugh* v. *Horsbrugh*, 9 D. 341.

[3] *Falconer* v. *Falconer*, 4 May 1721, Roberts. 377; *Falconer* v. *King's College of Aberdeen*, 31 Jan. 1721-2, Roberts. 397. Mr. Dickson, who cites the case (Law of Evidence, § 223), places it in contrast with the more discriminating judgments pronounced in the later cases in which extrinsic evidence was admitted.

[4] *Lee* v. *Pain*, 4 Hare, 216, per Wigram, V.-C.; *Hall* v. *Hill*, 1 D. & War. 116; *Hurst* v. *Beach*, *infra*.

[5] *Lindsay* v. *Anstruther's Tr.*, 6 Feb. 1827, 5 Sh. 298, N.E. 276.

[6] *Dicta* of Lord Justice-Clerk and Lord Jeffrey in *Horsbrugh's* case, *ut supra*, and Lord Truro in *Stoddart* v. *Grant*, 1 Macq. 174; *Guy* v. *Sharpe*, 1 My. & K. 589.

[7] *Hurst* v. *Beach*, 5 Madd. 351; and see the opinion of Earl Cairns in *Charter* v. *Charter*, L.R. 7 E. & J. App. 364, at p. 376.

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against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him, and to repel the presumption that a portion is satisfied by a legacy."

Proof that a legacy was intended to be in satisfaction of a debt.

714. In other cases evidence has been admitted to show that a legacy left by a debtor to his creditor was not intended to be in satisfaction of the debt,[1] and that a portion was not given in satisfaction of a legacy, or a legacy in satisfaction of a portion.[2] In this class of cases, the distinction between receiving evidence in support of the will, and in contradiction to it, has not been much regarded; and Mr. Tudor, who has collected all the *dicta* bearing on the subject, comes to the conclusion, in substance, that in any case evidence is admissible,—in the first place, to show whether the circumstances are such as to raise a presumption against accumulation of provisions; and, in the second place, for repelling that presumption where it arises.[3] In a case in the Court of Session an inquiry into the facts and circumstances was allowed; and the judgment, finding that a legacy was satisfied by a subsequent provision, proceeded upon evidence of the testator's intention.[4]

SECTION VI.

WHERE THE WORDS OF THE WILL ARE APPLICABLE INDIFFERENTLY TO MORE THAN ONE PERSON OR THING.

Evidence of testator's declarations admitted in such cases to remove the ambiguity.

715. The case supposed is that of an *ex facie* good designation of a person or thing, but which on inquiry is found to apply with equal precision to more than one person or thing. Here the evidence directed to the question of identification furnishes a double solution, and there is no possibility of ascertaining who or what was meant except by evidence of the testator's declarations or other indications of his intention. This is the case of what is called a latent ambiguity in a bequest, and in this case extrinsic evidence of intention is, and ever has been, competent in aid of the

[1] *Cuthbert* v. *Peacock*, 2 Vern. 593.

[2] *Booker* v. *Allen*, 2 Russ. & My. 270; *Trimmer* v. *Bayne*, 7 Ves. 508, 515, and cases cited by Tudor, *infra*.

[3] 2 Leading Cases in Equity, 6th ed. 398, citing opinions of Wigram, V.-C., in *Kirk* v. *Eddowes*, 3 Hare, 509, and of Sir J. Leach, M.R., in *Weall* v. *Rice*, 2 Russ. & My. 251, 263. These opinions are most instructive.

[4] *Livingstone* v. *Livingstone*, 7 Nov. 1864, 3 Macph. 20. See the concluding paragraph of the late Lord President's opinion, p. 26; *Campbell* v. *Campbell*, 14 Jan. 1865, 3 M. 360.

the interpretation of the will. The rule dates from the time of Lord Bacon,[1] by whom the distinction between patent and latent ambiguities in respect to the admission of evidence was originally pointed out; but the author of the treatise on extrinsic evidence has the merit of exhibiting the ratio of the rule in a very clear light, and of defining the limits of its application.[2]

Import of the authorities on the admissibility of evidence of testamentary intention.

716. The rule is thus stated by Professor Bell:—"There are two kinds of ambiguity, which are to be dealt with differently—1*st*, an ambiguity patent or apparent on the face of the contract, which, unless it can be solved by the context and nature of the contract, may be fatal; 2*d*, a latent ambiguity, arising not from the words, but in their application, and in this case extraneous evidence is admissible to clear up the difficulty."[3] It was referred to by Lord Brougham in two leading cases, in one of which it was made the foundation of the judgment pronounced by the House,[4] while in the other[5] occasion was taken by his Lordship to discriminate evidence of this kind from evidence going to identification merely, which is competent *in all cases*. "Where there is no latent ambiguity," said that eminent judge, "but only a patent ambiguity, you are not to go out of the deed in order, by any extrinsic evidence, to clear up a doubt that rises before your eyes upon the face of it. If it is a latent ambiguity, if evidence *dehors* the deed raises that doubt, you may have recourse to evidence *dehors* the deed to settle it. That rule is as old as the time of Lord Bacon, when he held the Great Seal, and that rule holds in all the Courts here and in Scotland. But the question, what is meant by a particular expression used to designate the subject-matter of the conveyance (what is called a question of parcel or no parcel), is always a matter of evidence, it does not come within the description of a latent or patent ambiguity, but is a matter of description, and that is matter of evidence."[6] In conformity with the views thus expressed, in a case where an instrument of sasine described the bailie as "Brown in Dubbs," and it was averred that there were more Browns than one in the locality named, extrinsic evidence was held to be admissible for the purpose of removing the latent ambiguity.[7] And so, where the lands of Craig are sold, and

[1] Regula 23, "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur." See Wigram's Commentary, pp. 174-184.

[2] Wigram, Proposition vii. p. 109, *et seq.*

[3] Bell's Pr. § 1885, 5th ed. § 1871. See Jarman, 5th ed. 400; Taylor on Evidence, 4th ed. p. 1017; 1 Dickson on Evidence, § 213 *et seq.*

[4] *Morton* v. *Hunter*, 26 Nov. 1830, 4 W. & S. 379.

[5] *Logan* v. *Wright*, 2 April 1831, 5 W. & S. 242.

[6] 5 W. & S. 247.

[7] *Morton* v. *Hunter*, *supra*; see Lord Brougham's observations, 4 W. & S. 386.

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the seller has North and South Craigs, extrinsic evidence is admitted, "because the document cannot take effect without parole proof to show which he meant."[1]

Cases distinguished of words applicable to *two* persons or things, and words inapplicable to *any* person or thing.

717. Before the publication of Sir J. Wigram's exposition of the rule, the English decisions upon the admission of evidence of intention were, according to that author, to a great extent arbitrary, and not to be explained upon any determinate principle.[2] They embraced two descriptions of cases: 1*st*, those in which the description in the will applied indifferently to more than one subject; and 2*d*, those in which it was inapplicable with certainty to any subject. Three leading cases have subsequently been decided, which have had the effect of restoring the true doctrine. Upon the authority of *Miller* v. *Travers* and *Hiscocks* v. *Hiscocks* evidence of intention is excluded in cases of the *second* class; by the case of *Gord* v. *Needs* its admissibility is recognised in cases of the *first* class.

Cases establishing Sir J. Wigram's distinction. In *Miller* v. *Travers* evidence inadmissible.

718. The question raised in *Miller* v. *Travers*[3] was, whether evidence to prove *intention*, as distinguished from explanatory evidence, was admissible to show that estates in the county of Clare were intended to pass by the description "estates in the county of Limerick,"—in other words, whether a description wholly inapplicable in itself to the subject alleged to be meant could be applied to that subject by force only of evidence of the testator's intention? It was held that the evidence was inadmissible. "The plaintiff contends," said the Judges, "that the will is to be read and construed as if the word 'Clare' stood in the place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parole evidence, to the making of a new devise for the testator, which he is supposed to have omitted."[4]

719. In *Hiscocks* v. *Hiscocks*[5] the testator devised to his son

[1] *Macfarlane* v. *Watt*, 6 Sh. 560, per Lord Pitmilly. The illustration is borrowed from Lord Bacon's commentary on the maxim cited *supra*, § 716.

[2] Wigram, 4th ed. p. 135.

[3] *Miller* v. *Travers*, 8 Bing. 244, on appeal to the Lord Chancellor, who called in the assistance of Tindal, C.J., and Lord Lyndhurst, C.B. The three judges were unanimous.

[4] 8 Bing. 249.

[5] *Hiscocks* v. *Hiscocks*, 5 M. & W. 363.

John Hiscocks for life, remainder to *John, his eldest son*, for life, remainder over. At the date of the will, John Hiscocks, the son, the first devisee for life, had been twice married. He had one son, Simon, by his first wife, and by his second wife an eldest son, John. At the trial evidence was adduced of instructions given by the testator for his will, and of declaration of his intentions; but, on appeal, this evidence was held to be inadmissible, and a new trial was granted. It was observed:—"There is but one case in which this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. . . . It appears to us that, in all other cases, parole evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will." [1]

In *Hiscocks* v. *Hiscocks*, evidence held inadmissible.

720. The precise condition contemplated in the preceding opinion—that of a description applicable indifferently to two objects—occurred in the case of *Gord* v. *Needs*.[2] The will contained a devise to George Gord, the son of John Gord; another to George Gord, the son of George Gord; and a third, after the expiration of certain life interests, to "George Gord, the son of Gord." There was no blank before the name of Gord the father, which might have occasioned a doubt whether the testator had finally fixed on any certain person in his mind. It was held that evidence of the testator's declarations was admissible to show that he intended that the subject of the third devise should go to George the son of *George Gord*. Upon appeal, the Court of Exchequer was of opinion that the evidence was properly admitted. "If," said Lord Wensleydale, "upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case *ambiguitas patens*, within the meaning of Lord Bacon's rule, which ambiguity could not be holpen by averment." After referring to the authorities in favour of the admission of evidence of intention in the circumstances under consideration, the judgment proceeds:—"There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George, the son

Gord v. *Needs*. Evidence of intention admitted.

[1] 5 M. & W. 368.

[2] *Gord* v. *Needs*, 2 M. & W. 129.

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of Gord,' had stood alone. But does the circumstance that there are two persons named in the will, each answering the description, prevent the application of the rule? We are of opinion that it does not. The mention of persons by those descriptions in other parts of the will has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had. . . . The present case really amounts to no more than this, that the person to whom the imperfect description appears on the parole evidence to apply is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself."[1]

Latent ambiguity, whether arising on a general conveyance by proprietor possessing on an imperfect entail.

721. To this rule or category may be referred the question, whether a *general disposition* of lands by a proprietor possessed of fee-simple estate, and also of estate held under the destination of an imperfect entail, ought to be regarded as raising a case of latent ambiguity, so as to let in evidence of the intention of the granter to include the entailed estate in the disposition. This question is fully considered in a subsequent chapter.[2]

Extrinsic evidence of intention not admissible to interpret a destination to "heirs."

722. In a case more frequently cited than followed (*Weir* v. *Steele*), parole evidence of intention was admitted for the purpose of determining whether the words "heirs and assignees" in a special conveyance of heritable estate in a contract of marriage meant the heir-at-law or the heir of the investiture.[3] But the authority of this case was denied in *Blair* v. *Blair*, Lord Moncreiff pronouncing it to be "contrary to all legal principle."[4] It is scarcely possible that a question of this nature can hereafter arise; for since it was decided in the cases of *Edgar* and *Molle*[5] that a destination of lands to heirs of provision is evacuated by a new investiture in favour of the proprietor and his heirs-general, it follows that the same effect must be attributed to a special destination to heirs-general in a will or family settlement.

Except in the special case, it is incompetent to prove intention by drafts, instructions, or other evidence extrinsic to the will.

723. Subject to the exception which has been admitted in the case of latent ambiguities, it is an inflexible rule of construction that evidence of intention,—that is, direct evidence proving the sense in which particular words were used,—is not admissible. The rule excludes not only evidence of spoken declarations, but also the use of papers of instructions, or drafts or copies of a will, whether for the purpose of filling up a blank,[6] or of correcting errors of

[1] 2 M. & W. 141.

[2] Chapter XXV., Section II. (Evacuation of Destinations by General Settlements).

[3] *Weir* v. *Steele*, 1745, M. 11,359.

[4] 12 D. 108 9. See Mr. Sandford's note on this case (Tr. on Entails, p. 82), and the judgment of the House of Lords in *Earl of Selkirk* v. *Douglas*, cited *supra*, § 703.

[5] *Edgar* v. *Maxwell*, 1736, M. 3089; *Molle* v. *Riddell*, 13 Dec. 1811, F.C. See also *Cathcart* v. *Earl of Cassilis*, 31 May 1825, 1 W. & S. 239 (2d point).

[6] The contrary decision in *Pollock* v. *Gilmour*, 1777, M. 8098, and "Legacy,"

transcription,[1] or of clearing up obscurities.[2] The judgment of a Court of construction is simply a declaratory exposition of what is contained in the will.

Cases to which the proposition has been held applicable.

724. We quote from Sir J. Wigram's work[3] the following *resumé* of the English authorities establishing this proposition:—"It has been laid down (either in *dictum* or decision) that evidence is inadmissible for the purpose—1, of filling up a total blank in a will;[4] or 2, of inserting a devise omitted by mistake;[5] or 3, of proving what was intended by an unintelligible word;[6] or 4, of proving that a thing *in substance* different from that described in the will was intended;[7] or 5, of changing the person described;[8] or 6, of reconciling conflicting clauses in a will;[9] or 7, of proving to which of two antecedents a given relative was intended to refer;[10] or 8, of explaining or altering the estate;[11] or 9, of proving which of several testamentary guardians was intended to have the actual care of children;[12] or 10, of proving what was to be done with the interest of a legacy till the time of payment;[13] or 11, of proving that by a bequest of residue a particular sum was intended;[14] or

App. No. 1, can scarcely be supported, we apprehend, at the present day.

[1] *Blair* v. *Blair*, 16 Nov. 1849, 12 D. 97. Lord Moncreiff observed: "It appears to me that it would be the most dangerous thing imaginable, if the Court were to look for the intention of the testatrix to any such paper of instructions. I hold the law to be clear, that we must find the intention of the testatrix within the four corners of the deed which she has legally executed. We are, undoubtedly, to look at the whole deed; and if there be any ambiguity in its terms, we are to take into consideration the circumstances under which the deed was executed,—that is, with reference to the state of the family, —and any relative deeds duly executed to which the testatrix was a party. Yet, even as to these things, it is only if the terms of the deed appear to be in themselves doubtful in their import or legal construction that it is either necessary or legitimate to affect or explain them by extraneous circumstances. . . . But of all things, it is the most dangerous to say that a regularly executed deed shall be controlled and perverted from its legal import by reference to an unauthenticated instrument said to contain the instructions of the deceased for making a deed of settlement. We know not what circumstances or what considerations may have intervened between the time when the paper of instructions was written and the date of executing the deed, whereby her intention may have been entirely altered" (12 D. 107).

[2] This is assumed in all the cases raising the issue of *will or instructions*, several of which are noticed in the first subdivision of this chapter.

[3] Wigram, p. 99.

[4] *Baylis* v. *Attorney-General*, 2 Atk. 239; *Castledon* v. *Turner*, 3 Atk. 257; *Hunt* v. *Hort*, 3 Bro. C. C. 311; *Taylor* v. *Richardson*, 2 Drew. 16.

[5] *Lady Newburgh's* case, 5 Madd. 364; *Anon.*, 8 Vin. Abr. 188.

[6] *Goblet* v. *Beechey*, 3 Sim. 24.

[7] Per M.R. in *Selwood* v. *Mildmay*, 3 Ves. jun. 306.

[8] *Delmare* v. *Robello*, 1 Ves. jun. 412; and see per M.R. in *Beaumont* v. *Fell*, 2 P. Wms. 140.

[9] Per Lord Hardwicke, C., in *Ulrich* v. *Litchfield*, 2 Atk. 372.

[10] *Lord Walpole* v. *Lord Cholmondeley*, 7 Term. Rep. 138; *Castledon* v. *Turner*, *supra*.

[11] *Cheyney's* case, 5 Rep. 68.

[12] *Storke* v. *Storke*, 3 P. Wms. 51; *contra*, *Anon.*, 2 Ves. sen. 56.

[13] *Munsell* v. *Price*, Sugd. on Vend. & P. 138, 6th ed.

[14] *Brown* v. *Langley*, 2 Eq. Abr. 416,

12, of construing the will with reference to the instructions given for preparing it;[1] or 13, of proving that an executor was intended to be a trustee of residue for next of kin;[2] or 14, of proving that an executor was intended to take beneficially where, upon the face of the will, it was conclusively apparent that he was intended to be a trustee;[3] or 15, of controlling a technical rule of verbal construction;[4] or 16, of explaining the sense in which the word "relations" was intended to be used;[5] or 17, what a testator intended to give by the word "plate;"[6] or 18, what a testator intended to devise by the word "lands out of settlement;"[7] or 19, of proving that a portion was intended to be a satisfaction of a bequest of residue;[8] or 20, that a legacy in a codicil was intended to be a substitution for a legacy in the will;[9] or 21, of proving that a devise to a wife was intended to be in bar of dower;[10] or 22, of supplying a use or trust;[11] or 23, of ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoneration of the personal estate;[12] or 24, of proving that the intention in appointing a debtor to be executor was to release the debt;[13] or 25, of rebutting a presumption which arises from the construction of words simply *qua* words;[14] or 26, of raising a presumption;[15] or 27, of increasing a legacy;[16] or 28, of increasing that which is defective;[17] or 29, of adding a legacy to a will;[18] or 30, of proving what interest a legatee was intended to take in a legacy;[19] or 31, of ascertaining an intention which, upon the face of the will, was indeterminate, as in the case of a devise to one of the sons of A., who hath several sons;[20] or 32, of proving that words of limitation were intended to be construed as words of purchase;[21] or 33, of proving that executors, who had acted in part, and then

and 8 Vin. Abr. 198. See *Dyose* v. *Dyose*, 1 P. Wms. 305, disapproved by Lord Thurlow in *Fonnereau* v. *Poyntz*, 1 Br. C. C. 472, and by Sir W. Grant, M.R., in *Page* v. *Leapingwell*, 18 Ves. 466; and see 1 P. Wms. 306, note.

[1] *Goodinge* v. *Goodinge*, 1 Ves. sen. 230; *Murray* v. *Jones*, 2 Ves. & B. 318; *Barnasconi* v. *Atkinson*, 10 Hare, 348.

[2] *Bishop of Cloyne* v. *Young*, 2 Ves. sen. 95; *White* v. *Williams*, Coop. 58; *Langham* v. *Sandford*, 2 Mer. 17.

[3] Cases in last note.

[4] Per Lord Kenyon, C.J., and Lawrence, J., 6 T. Rep. 252, 354.

[5] *Goodinge* v. *Goodinge*, 1 Ves. sen. 230; *Edge* v. *Salisbury*, Amb. 70; *Green* v. *Howard*, 1 Bro. C. C. 31.

[6] *Nicholls* v. *Osborn*, 2 P. Wms. 419; *Kelly* v. *Powlet*, Amb. 605.

[7] *Strode* v. *Russell*, 2 Vern. 621.

[8] *Freemantle* v. *Bankes*, 5 Ves. 85.

[9] *Hurst* v. *Beach*, 5 Madd. 351.

[10] *Leake* v. *Randall*, 1 Vin. Abr. 188.

[11] *Id. pl.* 4.

[12] *Bootle* v. *Blundell*, 1 Mer. 193.

[13] *Brown* v. *Selwyn*, 3 Br. P. C. 607.

[14] Per Lord Thurlow, 2 Br. C. C. 527.

[15] *Ratchfield* v. *Careless*, 2 P. Wms. 157.

[16] Per Lord Hardwicke in *Goodinge* v. *Goodinge*, 1 Ves. sen. 231.

[17] *Anon.*, 8 Vin. Abr. 188.

[18] *Whitton* v. *Russell*, 1 Atk. 448.

[19] *Lowfield* v. *Stoneham*, 2 Strange, 1261.

[20] 2 Vern. 625; and see *Altham's* case, 8 Rep. 155.

[21] *Brett* v. *Rigden*, Plow. 340; and see *Doe* v. *Kett*, 4 Term. Rep. 601; *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

renounced, were intended by the testator to act only to the extent to which they had acted;[1] or 34, of proving that the testator meant to use general words in this or that particular sense;[2] or 35, of adding to, detracting from, or altering the will;[3] or 36, generally of proving *intention*."[4]

SECTION VII.

Proof of completed Testamentary Intention.

Evidence to establish the testamentary character of the instrument.

725. Extrinsic evidence is also necessarily admitted for the purpose of establishing that the instrument propounded is in reality the last will of the testator. This involves not only the reception of evidence in support of the facts stated in the attestation clause,[5] where the authenticity of the will is challenged,[6] but also the inquiry whether a holograph unattested writing was intended to operate as a will, or as a paper of instructions.[7] In the cases which come before the Courts the evidence is rarely direct, and resort is had to inferences from correspondence, from conversations of the deceased person with his family or agents,[8] and even from the situation of the document when found in his repositories.[9] Evidence of the like description is admitted in relation to questions of revocation by cancelling or destroying a testamentary instrument *animo et facto*, and in the converse case of a proving of the tenor of a will or settlement accidentally destroyed.[10] The question

[1] *Doyle* v. *Blake*, 2 Sch. & Lefr. 240.

[2] *Goodinge* v. *Goodinge*, *supra*.

[3] *Herbert* v. *Reid*, 16 Ves. 481.

[4] See the cases cited in Wigram, p. 102.

[5] *Arnott* v. *Burt*, 1872, 11 M. 621; *Stirling Stewart* v. *Stirling Crawfurd*, 1885, 12 R. 610; *Veasey* v. *Malcolm's Trs.*, 1875, 2 R. 748; and by petition under the Titles Act, 1868, in *Addison*, 1875, 2 R. 457; *M'Laren* v. *Menzies*, 1876, 3 R. 1151; *Brown*, 1883, 11 R. 400. See as to evidence in cases of notarial subscription, *Watson* v. *Beveridge*, 1883, 11 R. 40; *Lang* v. *Lang's Trs.*, 1889, 16 R. 590.

[6] For the purpose of entitling a foreign will to probate or confirmation, a certificate of foreign counsel that the will is valid and authentic according to the law of the country where it is made, is *prima facie* evidence; in the goods of *Deshais*, 31 L.J. Pr. 58.

[7] *Munro* v. *Coutts*, 1813, 1 Dow, 437; *Inglis* v. *Harper*, 18 Oct. 1831, 5 W. & S. 785. In the latter case, the question whether a certain letter formed part of a will was, by the House of Lords, ordered to be submitted to a jury, a precedent which, for obvious reasons, has not been followed in any subsequent case. See also *Robb's Trs.* v. *Robb*, 1872, 10 M. 692; *Colvin* v. *Hutchison*, 1885, 12 R. 947; *contra*, *Goldie* v. *Shedden*, 1885, 13 R. 138.

[8] *Munro* v. *Coutts*, 1 Dow, 437, and cases cited *infra*, note 9.

[9] *Inglis* v. *Harper*, *supra*; see Lord Eldon's observations on this element of proof, 5 W. & S. 794. Also *Lowson* v. *Ford*, 20 March 1866, 4 Macph. 631; *Scott* v. *Scales*, 4 Feb. 1864, 2 Macph. 613; *Baird* v. *Japp*, 15 July 1856, 18 D. 1216; *Grant* v. *Stoddart*, 27 Feb. 1849, 11 D. 860, 865-6; *Forsyth's Trs.* v. *Forsyth*, 1872, 10 M. 616.

[10] *Nasmyth* v. *Hare*, 27 July 1821, 1

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whether a partial deletion or obliteration was the result of accident or design is clearly a question of evidence, and would seem to be open to inquiry, whether the object were to show that the deletion was accidentally done by the testator, or by another hand.[1]

Evidence in relation to ademption.

726. In relation to the cognate question of the ademption of legacies, evidence may of course be adduced establishing the acts of alienation whereby the gift is alleged to be adeemed, as to the nature of which a general reference to another part of the work may suffice.[2] On the question of the admissibility of evidence of intention in support of a will which is alleged to be revoked by the birth of a child to the testator, reference is made to the case of *Elder's Trustees*.[3] In that case the principle was applied which has been already been discussed with reference to Double Provisions,[4] —that evidence is not admissible against the will, but is admissible in support of the will and against the presumed revocation, provided facts be averred relevant to infer an intention that the will should subsist.

Sh. (App. Ca.) 65; *Laing* v. *Bruce*, 20 Nov. 1838, 1 D. 59; *Dow* v. *Dow*, 30 June 1848, 10 D. 1465; *Falconer* v. *Stephen*, 9 Dec. 1848, 11 D. 220; *Cunninghame* v. *Mowat's Tr.*, 17 July 1851, 13 D. 1376.

[1] Evidence is not admitted for the purpose of showing that material unauthenticated erasures were made before subscription or by the authority of the granter. See Lord Lyndhurst's opinion in *Grant* v. *Shepherd*, 6 Bell, 171-2; *Reid* v. *Kedder*, 12 Sh. 781.

[2] Chapter XXI., Section III.

[3] *Elder's Trs.* v. *Elder*, decided March 16, 1894.

[4] *Supra*, Section III.

PART IV.

OF REVOCABLE AND IRREVOCABLE GIFTS.

CHAPTER XXI.

REVOCATION OF WILLS IN GENERAL.

1. Express Revocation.
2. Revocation by the Birth of Children.
3. Ademption of Special Legacies.
4. Revocation by Cancelling or Destroying a Will, animo et facto.
5. Revocation, total or partial, by a subsequent inconsistent Testamentary Writing.

SECTION I.

Express Revocation.

How an intention to revoke may be expressed.

727. Reserving for separate discussion the subject of Power to Revoke, and the restrictions on the right resulting from delivery of the deed or subject, and from obligation, there is not much to be said on the subject of Express Revocation. In general, the intention to revoke a will, or a particular provision of a will, is effectual if declared in a holograph or tested instrument.[1] No particular form of words is necessary; and in numerous cases relating to informal codicils such words as "cancel," "annul," "recall," "alter," &c., have been interpreted as synonymous with "revoke." A revocation contained in a will made in a foreign country or colony, and executed according to the forms of the place of execution, is valid according to the intention expressed, and takes effect upon a conveyance of heritable estate in Scotland contained in the deed which is expressed to be revoked.[2]

Revocation in general terms.

728. Where a revocation is expressed in general terms, a question may arise as to whether a particular will or provision falls within its scope, as in a case where a testator in his holograph will

[1] Ersk. 3, 9, 5; Bell's Pr. § 1864; *Barclay* v. *Griffiths*, 1830, 8 S. 632; *Kidd* v. *Kidd*, 1843, 5 D. 1187; *Stewart* v. *Neilson*, 1860, 22 D. 646.

[2] *Purvis' Trs.* v. *Purvis*, 1861, 23 D. 812; *Leith* v. *Leith*, 1848, 10 D. 1137, overruling the earlier cases of *Dundas* v. *Dundas*, 1738, M. 15,585; *Lang* v. *Whytlaw*, 1809, 2 Sh. (App. Ca.) 13, note. See *Fordyce* v. *Cockburn*, 1827, 5 Sh. 897, N.E. 882.

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used the words, "I revoke all previous wills and testaments," and it was held that the revocation did not apply to a bond of annuity under the Aberdeen Act, which the testator had granted in favour of his wife.[1]

Effect of general revocation of prior wills in relation to heritable estate.

729. It is not uncommon for testators who are proprietors of estates in different parts of the United Kingdom to dispose of the English and Scottish estates by separate wills, prepared with the proper professional assistance. Now, under the law of Scotland, prior to the Titles Act, 1868, heritable estate could not be disposed of by will, but only by a writing which professed to be a conveyance *de præsenti*, but which was allowed to remain undelivered until the granter's death. It followed that a clause revoking all previously executed "wills,"[2] or "wills and testamentary dispositions,"[3] did not apply to dispositions of heritable estate in Scotland. It is evident that by the effect of the Titles Act, 1868, section 20, this question has passed into a new phase; because a revocation of all "wills" would certainly include a proper testamentary writing disposing of heritable estate in Scotland, and thus the distinction becomes very thin between such a writing and a settlement *intuitu mortis* expressed in dispositive language, which, although appropriate, is no longer necessary for the purpose.

Partial revocation.

730. Partial revocations will be efficacious according to their terms, whether these operate directly or indirectly. Thus a revocation of a trust for sale changes the quality of the succession from moveable to heritable.[4] A revocation of the fetters of an entail leaves the estate to descend as fee-simple, subject to a simple destination.[5] A revocation of an ulterior destination in a trust-deed causes the *jus crediti* to vest *a morte testatoris* in the institute,[6] and so on.

Revocation may be effectual, although the new gift is ineffectual.

731. A clause of revocation of previously executed wills, if clearly expressed, is effectual, although the new settlement should fail of its intended effect. Illustrations of this rule occur in a now closed chapter of the law, Deathbed, and in the last edition of this book it was pointed out that where a deed of alteration expressly revoked a previous settlement, the heir-at-law necessarily acquired an interest to reduce the deed of alteration,[7] and therefore it was

[1] *Maclean* v. *Maclean*, 1891, 18 R. 874.

[2] *Dundas* v. *Dundas*, 1783, 2 Pat. App. 618; *Brack* v. *Hogg*, 5 W. & S. 61, affirming 6 S. 113; *Cameron* v. *Mackie*, 7 W. & S. 106, affirming 9 S. 601.

[3] *Fordyce* v. *Cockburn*, 1827, 5 S. 897, N.E. 832; *Thomas* v. *Tennent's Trs.*, 1868, 7 M. 114.

[4] *Grindlay* v. *King*, 1853, 16 D. 27, and cases cited, *voce* Constructive Conversion (Chapter XI.).

[5] *Millar* v. *Marsh*, 1855, 2 Macq. 284; affirming 15 D. 823.

[6] *Johnston's Trs.* v. *Johnston*, 1891, 18 R. 823.

[7] *Neilson* v. *Stewart*, 1860, 22 D. 646; *Erskine* v. *Erskine's Trs.*, 1850, 13 D. 223; *Leith* v. *Leith*, 1863, 1 M. 949.

said, unless it is the desire of the testator that his heir at-law should succeed in the event of his death within sixty days, the conveyancer ought not to insert a clause of revocation, but should leave the revocation to be effected by legal implication. Another case of a revocation taking effect independently of the new conveyance, was the case of an English will professing to dispose of the granter's whole estate, but ineffectual as a disposal of heritage in Scotland. But here also, in order that the heir-at-law should acquire an interest, it was essential that the ineffective will should contain a clause expressly revoking the previous effective will, because if the revocation depended on implication, the implied revocation was necessarily dependent on the second will being an effective instrument.[1] Where a clause of revocation is unqualified and express, it must receive effect, although in the event which has happened the subject is not disposed of by the new settlement, and the effect of the revocation is to let in the claim of next of kin.[2]

SECTION II.

Revocation by Birth of Children.

Definition an origin of the rule as to revocation by birth of children.

732. Where a testator dies leaving a will or general settlement which was executed at a time when he had no issue, and a child is afterwards born to him, it may be posthumously or within a short interval prior to his death, there arises a very strong presumption that the disinheritance was unintentional.[3] For this reason, equity imports into the settlement the implied condition, *si testator sine liberis decesserit*, which is said to be borrowed from the Civil Law,[4] and is at all events supported by the analogy of the Civil Law rule applicable to substitutions.

[1] *Kirkpatrick's Trs.* v. *Kirkpatrick*, 1874, 1 R. (H.L.) 37, reversing 11 M. 551.

[2] *Reynolds* v. *Miller's Trs.*, 1884, 11 R. 759.

[3] Ersk. 3, 8, 46; Bell's Prin. § 1776.

[4] Mr. Erskine, in the passage cited above, appears to confound the doctrine of implied institution of a legatee's children with that now under consideration; the passages which he cites from the text of the Civil Law are applicable to the former doctrine. The fact is, that the equitable privileges accorded by the Roman law to children for whom no testamentary provision had been made were greatly more extensive than those which the Courts of Great Britain have received as part of their municipal law. By the Civil Law, every child, whether born or unborn at the date of the father's settlement, must be either expressly instituted heir, or expressly disinherited. Accordingly, if a Roman citizen made a will, passing over any of his children without words of *express* disinherison, the will was broken (*ruptum*); Inst. lib. 2, tit. 13, 1; lib. 2, tit. 17, 1. As one application of this principle, the force of a settlement was held to have been destroyed by the birth of children after the date of the settlement—*liberi postumi*—unless such children had been expressly disinherited by such words as, "Whatever children may hereafter be born to me, I disinherit them." Even in that case, it would seem that the settlement was liable to be set aside, as improvident, under the *querela inofficiosi testamenti*.

CHAPTER XXI.

Qualifications of the principle. Analysis of the decided cases.

733. The benefit of this implied condition is personal to those children of the testator whose interests are affected by the settlement, and in the event of their death without having obtained a judgment finding them entitled to the benefit of the condition, it would appear that no right passes to their representatives.[1] The leading case is *Colquhoun* v. *Campbell*.[2] The testator, who had been twice married, and had no prospect of a family, bequeathed one-half of his personal property to his widow, and the other half to his collateral relations in the proportion of certain specified sums of money, and also assigned his interest in the lease of a farm to his widow. Three years after the execution of the settlement a daughter was born; the testator survived the period of her birth only three months, during which time he was suffering from ill-health. The Court held that the implied condition was applicable, and reduced the settlement. The judges differed as to the extent to which the doctrine of presumed revocation should be carried. Lord Glenlee held that the condition would apply, unless it were "as plain as a pike-staff that the testator did not intend the succession to go to the child;" while the other Judges seemed to rely rather on the special circumstances of the case, and particularly that the period of survivance was very short, that the deed was a total settlement, and that the reduction was at the instance of the daughter personally, suing by her factor. It was at one time considered doubtful whether the principle ought to apply in a case where the testator had survived the birth of a child for such a time as would have enabled him to alter his will if so minded. This doubt was thought ill-founded in the case of *Dobie's Trustee*,[3] Lord Rutherfurd Clark observing—"I am much inclined to the opinion that the revocation was absolute, and that even had the maker survived the birth of the child for a long time the will could receive no effect." In the subsequent case of *Munro's Executors*,[4] a will made when the testator was unmarried in favour of the granter's parents and nephew was set aside at the instance of the widow and children; and as the report states that there were three children, there can be no doubt that the testator (who was a writer by profession) had ample time to alter the will after the birth of the eldest child.

Whether pecuniary legacies are revoked by birth of children.

734. In *Colquhoun's* case all the legacies were in effect shares of residue. The question whether the condition attaches to pecuniary legacies was formally reserved; but it is difficult to find a

[1] *Watt* v. *Jervie*, 1760, M. 6401.

[2] *Colquhoun* v. *Campbell*, 5 June 1829, 7 Sh. 709.

[3] *Dobie's Trs.* v. *Pritchard*, 1887, 15 R. 2.

[4] *Munro's Exrs.* v. *Munro*, 1890, 18 R. 122.

principle for distinguishing between the cases. There is perhaps greater reason for excluding the application of the implied condition in the case of a specific legacy, or destination of a special subject.[1]

Rule fails where there is evidence of an intention to exclude.

735. The condition fails where there is a manifest or presumable intention to disinherit. "If," says Erskine, "the testator had afterwards children, and, notwithstanding their existence for some competent time before his death, made no alteration of the settlement in their favour, it is presumed that he neglected them from design, especially if the settlement was not of the whole or the greatest part of his estate."[2] On this principle, provisions in one case to a brother, and in another case to a wife, were sustained, where the granter had survived the birth of his child a few years without revoking the provision.[3] In one of the later cases it was held that the *conditio* did not apply, because the will was executed by the testator in the knowledge that his wife was pregnant, and because it was not a general disposition disposing of the *universitas* of his estate.[4]

Whether a settlement is impliedly revoked by the birth of a posthumous child.

736. It was stated in the last edition of this book as a point to be determined, with reference to the case of a general settlement by a father in favour of his existing children *nominatim*, whether, in the event of a posthumous child being born (or, what is the same in legal effect, in the event of the father dying suddenly after the birth of a child), the condition *si sine liberis* would operate so as to give a right to a share of the succession to such subsequently born child.[5] In the case of *Oliphant* v. *Oliphant*, reported by Mr. Bell,[6] the Court sustained the claim of a posthumous child to a share of a bond of provision destined to the granter's two elder daughters *nominatim*, on the ground that the question was one not of the interpretation, "but of the extension of a will."[7] The question has now been determined in the negative in the important case of *Spalding*,[8] and it was there pointed out by the Lord President that the case of *Oliphant* proceeded to some extent on the authority of a previous case, *Anderson*, which is now known to have been reversed in the House of Lords. In point of principle, there

[1] See *Mags. of Montrose* v. *Robertson*, 1738, M. 6398; *Yule* v. *Yule*, *infra*; *Galloway* v. *Grant*, 21 Feb. 1851, 13 D. 756.

[2] Ersk. 3, 8, 46.

[3] *Yule* v. *Yule*, 1758, M. 6400; *Millar's Trs.* v. *Millar*, 1893, 20 R. 1040.

[4] *Adamson's Trs.* v. *Adamson's Exrs.* 1891, 18 R. 1133.

[5] In the language of the Roman law, all children born after the execution of the settlement were designated *liberi postumi*. See on this subject generally, Inst. lib. 2, tit. 13, 1, and 2, 17, 1; Dig. lib. 28, tit. 3, fr. 3; and 28, 2, 10.

[6] *Oliphant* v. *Oliphant*, 1794, Bell's Fol. Ca. 125; 5 Br. Sup. 648. See *Anderson* v. *Anderson*, 1729, M. 6590; 1 Pat. 136; *Dempster* v. *Willison*, 1799, M. 16,947.

[7] Bell's Fol. Ca. 126.

[8] *Spalding* v. *Spalding's Trs.*, 1874, 2 R. 237; *Findlay's Trs.* v. *Findlay*, 1886, 14 R. 167.

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is no difference between the extension of a special provision and that of a residuary destination, the difference being merely one of amount. The posthumous child would, in any view, be entitled to legitim.

Revocation by birth of a son and heir.

737. Since this chapter was written, it has been held that the birth of a son to a testator, who only had daughters when he made his will, had the effect of revoking the destination of the heritable estate.[1] The cases referred to in another part of this treatise on the subject of the *conditio si institutus sine liberis decesserit* may be consulted as throwing light on this subject.

SECTION III.

Ademption of Special Legacies (Effect of Alteration of the Granter's Title).

Revocation by ademption of special legacy.

738. The doctrine of the ademption of legacies, and their satisfaction by provisions or gifts *inter vivos*, may also be regarded as a species of revocation by legal implication, as, for example, where the revocation of a legacy is implied from the payment of an equivalent sum of money to the legatee,[2] or where, from any subsequent act of the testator, fulfilment is rendered impossible—*e.g.*, by selling the subject, or bequeathing it to another person.[3] Thus, a special legacy of "the sum of £1000, lent on bond to E. and J.," was held to be evacuated in consequence of the debtor having voluntarily paid up the bond two years before the testator's death.[4] And where a testator, by his settlement, directed four houses to be conveyed to his four nephews respectively, and one of these houses was thereafter acquired by a railway company under their compulsory powers,—on the death of the testator without having altered his settlement, it was held that the nephew to whom the house was destined had no claim for its value, because the sale of the house was equivalent to ademption of the provision.[5]

[1] *Elder's Trs.* v. *Elder*, 16 March 1894. See also the case of *Grant's Trs.* v. *Grant*, 24 D. 1211, where the *conditio si institutus sine liberis*, &c. was applied to a settlement of heritage, and it was held that, in this relation, it operated in favour of the eldest son.

[2] *Robertson* v. *Robertson's Trs.*, 15 Feb. 1838, 16 Sh. 554; *Mollison* v. *Buchanan*, 22 Feb. 1822, 1 Sh. 346, N.E. 324; *Burrell* v. *Burrell*, 15 May 1828, 6 Sh. 801. But see *contra*, *Hume* v. *Stewart*, 26 Nov. 1834, 13 Sh. 90.

[3] *Paul* v. *Paul's Trs.*, 5 July 1821, 1 Sh. 101; *Wyllie* v. *Ross*, 12 Nov. 1825, 4 Sh. 172, N.E. 174; 2 W. & S. 576.

[4] *Pagan* v. *Pagan*, 26 Jan. 1838, 16 Sh. 383.

[5] *Chalmers* v. *Chalmers*, 19 Nov. 1851, 14 D. 57. See also *Jack* v. *Lauder*, 1742, M. 11,357; *Presbytery of Kirkcudbright* v. *Blair*, 1742, Elch. "Legacy," No. 10, M. 8066; *Panton* v. *Gillies*, 22 Jan. 1824, 2 Sh. 632, N.E. 536; *Forlong* v. *Taylor's Exrs.*, 15 Sh. 126; 3 April 1838, 3 S. & M'L. 177.

Ademption of special legacies by conversion of the subject.

739. The doctrine of the ademption of special legacies was first established in England by the decision of Lord Thurlow in the leading case of *Ashburton* v. *Macguire*,[1] where a legacy of a bond debt was held to be partially adeemed by the testator having received dividends on the debt in bankruptcy; and a legacy of £1000 East India stock was held to be adeemed *in toto* in consequence of the testator having sold the stock. In the subsequent case of *Stanley* v. *Potter*,[2] the same eminent judge remarked that the test of ademption was whether the thing remained at the testator's death, as if the testator had given a particular horse, which died or was disposed of in his lifetime, when of course there was nothing on which the bequest could operate. "The idea of proceeding," he continued, "on the *animus adimendi*, has introduced a degree of confusion into the cases which is inexplicable, and I can make out no precise rule from them upon that ground. . . . It will be a safer and clearer way to adhere to the plain rule before mentioned, which is to inquire whether the specific thing given remains or not." A specific legacy of corporeal moveables is considered to be adeemed by their total loss or destruction during the life of the testator, although they may have been insured, and their value recovered from the insurers.[3]

Ademption, how far affected by intention.

740. The generality of the principle has been subjected to a severe test in some of the English cases in relation to changing securities. In *Barker* v. *Rayner*[4] a testator bequeathed two policies of assurance upon the life of his wife to his executors upon certain trusts; and his wife having predeceased him, he received the amount, and after paying out of the proceeds a debt in security of which they had been assigned, invested the balance in securities, upon which it remained until his death. Sir John Leach, V.-C., held that the legacy was adeemed, on the principle that the Court could only inquire whether the specific thing remained at the death of the testator, and could not enter into the consideration whether it had or had not ceased to exist by an intention on the part of the testator to adeem it. This decision was affirmed by Lord Eldon on appeal.[5] In *Gardner* v. *Hatton*,[6] the testator bequeathed £7000, secured by the mortgage of a particular estate. After the date of the will the principal sum and interest were received by the testator's agent on his account, who immediately afterwards invested £6000 of it upon another mortgage, upon which it remained at the testator's death. Sir L. Shadwell, V.-C.,

[1] *Ashburton* v. *Macguire*, 2 Br. C. C. 108.

[2] *Stanley* v. *Potter*, 2 Cox, 182.

[3] *Durrant* v. *Friend*, 5 De G. & Sm. 343.

[4] *Barker* v. *Rayner*, 5 Madd. 208.

[5] 2 Russ. 122.

[6] *Gardner* v. *Hatton*, 6 Sim. 93.

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ruled that the legacy was specific, and that, as the testator had received the whole of the debt, it was a clear case of ademption. It has been considered an open question whether a testator, who having made a specific bequest of stock sells it, and afterwards purchases the same or a less amount of the same stock, thereby revives the bequest;[1] but we do not see upon what principle this point can be distinguished from the case of reinvestment of money on mortgage noticed above.

Exceptional cases.

741. The conversion of Government stock from one denomination into another by Act of Parliament, or of railway shares into consolidated stock, is not ademption.[2] A destination will not be affected by a mere alteration of title, as by a transference of the subject of bequest from the name of a trustee to that of the testator.[3] Nor will the unauthorised act of the testator's agents, or of his guardians in the event of supervening incapacity, have the effect of disappointing the special legatee.[4] In a case where a lady left sealed testamentary instructions to her agent as to the disposal of a sum of £4000 deposited in bank, and afterwards, at the suggestion of the agent, invested this sum in a heritable bond, for the sake of the higher interest thus obtained, it was held that the bequest contained in the testamentary titles was adeemed. Lord Moncreiff drew attention to the discrepancy between the British law on this subject and the doctrine of the Civil Law (Inst. 2, 20, 12), according to which the legacy was due if the testator did not sell the subject with the intention to revoke the legacy, adding that our decisions appeared to be at variance with the principles of jurisprudence.[5]

Ademption by the re-settlement of estate on which a provision is charged.

742. On a principle identical with that of the ademption of special legacies, it has been considered that if a testator makes a re-settlement of his estate, this imports a revocation not only of the previous destination of the estate, but also of all provisions constituted in the form of burdens upon the estate. Accordingly, provisions charged upon an entailed estate under the Aberdeen Act were held to be revoked *ademptione* by the execution of a new deed of entail in favour of the same series of heirs, and with the same conditions, &c., under the powers of the 4th section of the

[1] See 2 Wh. & T. L. Ca. 6th ed. 284.

[2] *Oakes* v. *Oakes*, 9 Hare, 666, and cases there cited. See *Mitchell's Trs.* v. *Fergus*, 1889, 16 R. 902, a case of the conversion of gas shares into annuities payable by a municipal corporation, where the judges differed in opinion on this point.

[3] *Dingwall* v. *Askew*, 1 Cox, 427.

[4] *Taylor* v. *Taylor*, 10 Hare, 475, decided by Wood, V.-C., where the principles previously recognised as to conversion by trustees and guardians, in questions between heirs and executors, were held to be applicable to the defeasance of the rights of specific legatees.

[5] *Anderson* v. *Thomson*, 1877, 4 R. 1101.

Entail Amendment Act.[1] But a mere renewal of the investiture in favour of the granter and his heirs, or the taking of a security in the same form to a subject to which a title had not previously been made up, does not, in general, operate as an ademption of a prior specific destination.[2] Where a testator, without expressly revoking a subsisting destination of his heritable estate, executed a new settlement of a certain part of it, for the purposes of constituting a life interest and of charging certain debts upon the estate, and took the title in favour of his heirs and disponees in fee, this was held to amount to a revocation of the prior destination.[3] In such cases it is necessary to look to all the circumstances for the purpose of discovering whether there was or was not an intention to adeem. According to one of the later decisions, the ademption of a destination of a heritable subject, consequent on the sale of the subject, has not the effect of destroying family provisions made by way of direction to burden the heritable subject.[4]

SECTION IV.

Revocation by Cancelling or Destroying a Will animo et facto.

Cancellation *animo et facto* equivalent to express revocation.

743. A settlement may also be *de facto* revoked by physically destroying or cancelling it; the requisites of which are (1) a final intention to revoke, and (2) an act of cancellation indicating such an intention.[5] The rule is illustrated by the case of *Nasmyth* v. *Hare*, where a testator cancelled his will by tearing off his seal, which was prescribed as a solemnity in the testing clause of the will;[6] and by the more recent cases of *Falconer* and *Dow*.[7] Where the mutilation of the will is proved to have been accidental,[8] or the result of insanity or of passion,[9]—revocation not being intended,[10]

[1] *Hay Newton* v. *Hay Newton*, 18 July 1867, 5 Macph. 1056. Affirmed 9 May 1870, 8 M. (H.L.) 66.

[2] *M'Arthur* v. *Jamieson*, 2 Sh. 23, N.E. 20; 22 March 1825, 1 W. & S. 60; *Hay* v. *Crawford*, 1678, M. 14,899; *Earl of Kelly* v. *Duncan*, 1725, M. 10,660. See, as to moveable estate, *North British Insurance Co.* v. *Tunnock*, 1 Nov. 1864, 3 Macph. 1.

[3] *Murray* v. *Smith*, 2 Feb. 1831, 9 Sh. 378.

[4] *Congreve's Trs.* v. *Congreve*, 1874, 1 R. 1102.

[5] Dickson on Evidence, § 901.

[6] *Nasmyth* v. *Hare*, 27 July 1821, 1 Sh. (App. Ca.) 63.

[7] *Falconer* v. *Stephen*, 9 Dec. 1848, 11 D. 220; *Dow* v. *Dow*, 30 June 1848, 10 D. 1465. See also *Houston* v. *Shaw*, 1711, Rob. 552, 561; *Donald* v. *Kirkaldy*, 8 April 1788, 3 Pat. 105; *Pattison's Trs.* v. *University of Edinburgh*, 1838, 16 R. 73.

[8] *Cunninghame* v. *Mouat's Tr.*, 17 July 1851, 13 D. 1376; *Irvine* v. *Lang*, 6 March 1840, 2 D. 804.

[9] *Laing* v. *Bruce*, 20 Nov. 1838, 1 D. 59.

[10] *Doe* v. *Perkes*, 3 B. & Ald. 489.

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—in any of these cases there is no cancellation *animo*, and therefore no revocation.

Cancellation by procuration.

744. A testator may empower another person to cancel his settlement; but such a power will not be raised by implication; nor will an improbative authority to cancel be sustained.[1] In *Douglas* v. *Douglas' Trustees*, the testator had added a postscript to a codicil, stating, "I am aware how very incorrect all these writings are, and I hereby empower my brother to alter any part of them he may deem proper." It was held that this direction referred only to corrections in point of form, and that the brother was not thereby empowered to alter the disposal of the residue of the property.[2]

Acts equivalent to cancellation.

745. Where it is proved that a testator intrusted his will to the keeping of an agent, with instructions to destroy it, and his instructions were disobeyed,[3] or where the intention to revoke is defeated by the conduct of an interested person, the act of cancellation is held to be accomplished, the testator having done all that was in his power to effect it.[4] And where a will is executed in duplicate, the cancellation of one of the duplicates, with the intention of revoking its dispositions, is effectual as an act of revocation.[5] But where a will was executed in duplicate, and after the death of the testator one of the duplicates was found mutilated, but the other was preserved intact in the custody of the testator's agent, who had no knowledge of any intention to revoke the will, it was held that in such a case the presumption was in favour of the subsistence of the will, in the absence of evidence that the cancellation of the copy was done by the testator with intention.[6]

Grantee claiming under deed found cancelled bound to prove its subsistence.

746. Where a will known to have been in existence is not forthcoming after the testator's death, it is necessarily presumed to be non-existent until its subsistence is established by a process of proving the tenor. It has been observed that this presumption does not arise unless there is evidence to satisfy the Court that the will was not destroyed after the testator's death.[7] A similar pre-

[1] *Logan* v. *Logan*, 27 Feb. 1823, 2 Sh. 253, N.E. 222.

[2] *Monteath Douglas* v. *Douglas' Trs.*, 30 June 1859, 21 D. 1066.

[3] *Chisholm* v. *Chisholm*, 1673, M. 12,320. But see *contra*, *Walker* v. *Steele*, 16 Dec. 1825, 4 Sh. 323, N.E. 327.

[4] *Buchanan* v. *Paterson*, 1704, M. 15,932; *Bibb* v. *Thomas*, 2 W. Blackst. 1043.

[5] *Burtonshaw* v. *Gilbert*, 1 Cowper, 49; *Pemberton* v. *Pemberton*, 13 Ves. 310, cited in *Winchester* v. *Smith*, *infra*.

[6] *Crosbie* v. *Wilson*, 2 June 1865, 3 Macph. 870.

[7] The mode in which this qualification of the presumption is applied is well exemplified in an English decision. A will which had been in the testator's custody could not be found in his repositories after his death, but there was evidence of declarations recognising its existence up to within three weeks of his death; there was no evidence of any change of intention during those three weeks, and the only person who was interested in an intestacy had access to and made a search in the repositories before they were searched by any other person. Coupling these facts with the

sumption arises where a deed is found cancelled in the testator's repositories after his death. In such a case, according to the most recent authorities, the *onus* of proving the subsistence of the will rests with the party claiming under it. The question was raised in an action of proving the tenor of a mutual settlement executed by spouses in favour of the survivor, and providing for the distribution of the estate of the survivor after the decease of both the spouses, which was found, on the death of the husband, with the signatures of the wife and of the instrumentary witnesses cancelled. A proof having been allowed, at the instance of a party having an interest under the ulterior destination, the widow deponed that she had cancelled the signatures in a fit of passion, and without her husband's knowledge. A majority of the Judges of both Divisions of the Court were of opinion that it was incumbent on the pursuer of the action to prove that the cancellation took place in a way that did not affect the validity of the instrument; that the uncorroborated testimony of the widow was not legal evidence of the subsistence of the deed, and that the action accordingly fell to be dismissed.[1]

Effect of cancellation.

747. A deed when cancelled leaves the estate in the same situation as if it had never existed,[2] though the instrument may perhaps be looked at for the purpose of ascertaining what was in the mind of the testator before he altered his purpose.[3] Assuming that the cancelled deed is to be regarded as non-existent, it follows that the cancellation of a deed containing a clause of revocation may have the effect of reviving a previously executed will. When it is considered that the revoking deed could not have any legal effect while it remained undelivered in the hands of the granter, the revival of the previously executed deed is a consequence which may be admitted without any legal or practical objection.[4]

Effect of cancellation according to the law of England.

748. The revocation of wills and testamentary writings made in England, by way of cancellation or physical destruction, was originally legalised by the Statute of Frauds,[5] and now rests upon the authority of that Act of Parliament and of a Statute of the present reign, which permits the revocation of testamentary instruments, by "burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction,

non-appearance of the person interested in the intestacy, the Court of Probate refused to presume that the will had been revoked, and granted probate of the draft of the will; *Finch* v. *Finch*, Law Rep. 1 Prob. and Div. 371.

[1] *Winchester* v. *Smith*, 20 March 1863, 1 Macph. 685.

[2] But see *contra*, *Mure* v. *Mure*, 1 June 1813, F.C.

[3] *Adv.-Gen.* v. *Smith*, 1 Mar. 1852, 14 D. 585, and Exch. Rep.; 15 June 1854, 1 Macq. 760; *Mags. of Dundee* v. *Morris*, 3 Macq. 164, 171.

[4] See *Howden* v. *Howden*, 8 July 1815, F.C.

[5] 29 Car. II., cap. 3, § 6.

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with the intention of revoking the same."[1] The cases are very numerous; and considering that decisions on the construction of a Statute are never of any great authority as regards the elucidation of a cognate rule resting on the authority of the common law, it has not been thought necessary to enter more fully into the subject, or to attempt a *resumé* of the English authorities.[2]

SECTION V.

Revocation, Total or Partial, by a subsequent inconsistent Testamentary Writing.

Express and implied revocation distinguished.

749. Revocation, total or partial, as the case may be, is implied from the fact that two settlements executed by the same person are inconsistent with one another, in which case the rule is applicable, *posteriora derogant prioribus*.[3] Great difficulty is often experienced in resolving the question, Which of the testamentary writings found in the repositories of a deceased person constitute his last will? Some positive rules have been laid down; but in their application to actual cases much is necessarily left to the discretion of the judge. Settlements executed of the same date are construed as one deed.[4] A settlement containing a residuary clause may, but does not necessarily, supersede previous bequests of money or special subjects.[5] A will which partakes of the quality of a total settlement is considered to be in its purpose and intention incompatible with the subsistence of a previously executed will or settlement, insomuch that a lapsed share of succession under a last will of the total estate will be given to the legal representatives of the testator rather than to the legatees under a previously executed will.[6] But it has been determined, that where a settlement containing a general clause of revocation makes no provision as to the disposal of a certain *specific estate*, the heir to whom that estate was destined under a previous settlement shall take it rather than the granter's heir-at-law.[7] Codicils which are prior in date to the leading settle-

Rules of construction for determining questions of implied revocation.

[1] 1 Vict., cap. 26, § 20.

[2] See the subject discussed in 1 Jarman on Wills, 5th ed. pp. 113-126.

[3] *Mitchelson* v. *Mitchelson*, 15 Nov. 1820, F.C.; *Burnett* v. *Burnett*, 1701, M. 15,566; *Balvaird* v. *Latimer*, 5 Dec. 1816, F.C.; *Barclay* v. *Griffiths*, 4 Mar. 1830, 8 Sh. 632; *Beattie* v. *Thomson*, 21 June 1861, 23 D. 1163; and see *contra*, *Dove* v. *Smith*, 31 May 1827, 5 Sh. 734, N.E. 684.

[4] *Fergus* v. *Fergus*, 7 Feb. 1833, 11 Sh. 362; *Inglis* v. *Harper*, 18 Oct. 1831, 5 W. & S. 785, reversing 6 Sh. 864.

[5] Special Case *Kenmore's Trs.*, 1869, 7 M. 771. See *Sibbald's Trs.* v. *Greig*, 1871, 9 M. 399; *Grant* v. *Stoddart*, 11 D. 869, per Lord Jeffrey; and 1 Macq. 163; *Sellar* v. *Stephen*, 21 June 1855, 17 D. 975.

[6] *Bertram's Tr.* v. *Matheson's Tr.*, 1888, 15 R. 573; *Grant* v. *Stoddart*, 27 Feb. 1849, 11 D. 870.

[7] *Allan* v. *Glasgow*, 4 D. 494; 14

ment ought not to be held effective if they are explanatory of or ancillary to a previous settlement which is revoked by implication.[1] Yet even this rule is subject to exceptions. For example, a codicil bequeathing a specific subject was held effectual, even when anterior in date to the last general settlement.[2] The circumstance that a number of the legacies contained in a partial will or settlement are repeated in a subsequent total settlement—the same sums being given to the same persons—creates a strong presumption that the former will is impliedly revoked.[3] A will or codicil which is invalid from insufficient attestation or similar causes can have no effect as a revocation of a prior will.[4]

If possible, both wills shall subsist.

750. Where it appears that two testamentary writings are capable of standing together as one settlement, no implied revocation can be inferred in relation to any of the bequests of the first executed will, unless the terms of the bequest are *necessarily* inconsistent with those of the last will.[5] The case of *Alves* v. *Alves* is an illustration. The testator, by his trust-settlement, divided the residue of his estate into two equal shares, to be distributed amongst certain relatives, who, in the concluding part of the clause, were also appointed "residuary legatees." By a codicil he made a new division of the residue into three equal shares, as to one of which there was a total failure of the objects of the destination. This share was claimed as lapsed succession by the legal representatives of the testator, and as residue by the residuary legatees of the first

Aug. 1846, 5 Bell, 379. This principle was applied when the deed last executed, though in form a total settlement, was, by reason of the omission to make use of dispositive words, ineffectual to carry heritable estate in Scotland; *Richmond's Trs.* v. *Winton*, 25 Nov. 1864; 3 Macph. 95; *Campbell's Trs.* v. *Campbell*, 24 D. 1322.

[1] *Stewart* v. *Baillie*, 27 Jan. 1841, 3 D. 463.

[2] *Fleming* v. *Fleming*, 1800, M. "Implied Will," App. No. 1; *Dalglish's Trs.* v. *Crum*, 1891, 19 R. 170, where the codicil was of intermediate date, and the two settlements were identical.

[3] *Macleod's Trs.*, 1871, 9 M. 903; *contra*, *Low's Exrs.*, 1873, 11 M. 744; and observations of Lord Justice-Clerk in *Horsbrugh* v. *Horsbrugh*, 9 D. 341. "The presumption is always strongly adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instrument. To establish such a paper, there must be the fullest proof of capacity, volition, final intention, and involuntary interruption." —Jarman on Wills, 5th ed. 97.

[4] *Stirling Steuart* v. *Stirling Crawfurd's Trs.*, 1885, 12 R. 610; and see the case of *Kirkpatrick*, cited *infra*.

[5] *Grant* v. *Stoddart*, 11 D. 876, per Lord Fullerton; 1 Macq. 163; *Dove* v. *Smith*, 31 May 1827, 5 Sh. 734, N.E. 684; *Allan* v. *Sinclair*, 1776, 2 Pat. 403. Where the last will contains an express revocation of all previously executed wills, the clause must receive effect notwithstanding that a prior will may be capable of standing along with the last; *Lawrie's Trs.* v. *Lawrie*, 12 July 1843, 5 D. 1346; *Kirkpatrick's Trs.* v. *Kirkpatrick*, 1874, 1 R. (H.L.) 37; *Thomas* v. *Tennent's Trs.*, 1868, 7 M. 114.

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executed settlement. It was held that, although the partition of the estate into three shares was an implied revocation of the the previous partition into two shares, that it did not operate as a revocation of the ultimate residuary bequest contained in the original settlement.[1] The second *Roxburgh* case decides that an implied revocation is only operative in the event of the last executed will being effectual; but that if it should be reduced *ex capite lecti*, or on any extrinsic ground, the inconsistency does not arise,[2] and the first will is to be held effectual. A revocation of the beneficiary interest given to persons who are also appointed executors does not imply a revocation of their appointment as executors.[3]

Revival of revoked will by the operation of a subsequent revoking instrument.

751. A testamentary deed of revocation has the same ambulatory character which belongs to a testamentary disposition, and therefore, where the will to which the words of revocation apply is not cancelled or destroyed, it may be revived by revoking or destroying the revocation of it. Thus, where a trust-deed, being the last testamentary settlement of the granter, contained a revocation of all previously executed wills and settlements, and this settlement was itself destroyed by the testator's directions in his lifetime, the revocation which it contained was held to be destroyed as well as the positive dispositions of the settlement, and a previously executed will was therefore revived.[4] And a revocation by testamentary disposition of a last will disposing of the *universitas* of the testator's estate was found to have the effect of reviving a previously executed will.[5] In another case it was held that a revoked testamentary disposition was not revived by being delivered by the testator to his trustees with a direction not to open the packet until after his death.[6]

[1] *Alves* v. *Alves*, 8 Mar. 1861, 23 D. 712,

[2] *Roxburgh* v. *Wauchope*, 25 May 1820, 6 Paton, 548.

[3] *Scott* v. *Peebles*, 1870, 8 M. 959.

[4] *Howden* v. *Crichton*, 8 July 1815, F.C. See 1 Jarman on Wills, 5th ed. 113.

[5] *Dove* v. *Smith*, 31 May 1827, 5 Sh. 734, N.E. 684.

[6] *Ker* v. *Erskine*, 16 Jan. 1851, 13 D. 492.

CHAPTER XXII.

POWER TO REVOKE.

1. Unilateral Instruments and effect of Delivery or Transfer to Trustees.
2. Mutual Wills and Settlements, and Wills founded on Agreement.
3. Rights under Marriage Settlements, whether Contractual or Revocable.

SECTION I.

Unilateral Instruments and effect of Delivery or Transfer to Trustees.

Will or settlement undelivered is ambulatory, and subject to granter's power of revocation.

752. The granter of a will or settlement is entitled to revoke or alter its dispositions so long as the instrument and the estate conveyed by it remain subject to his control, which in general will be the case while the instrument is undelivered. And where by a contract of marriage the husband's estate is disposed of only in a certain event, *e.g.*, by giving it, in the event of his wife's survivance, to her in liferent, and to the children of the marriage in fee, the settlement is revoked by the occurrence of the alternative event of the wife's predecease, and a new settlement may then be made for different purposes.[1] A settlement of heritable estate containing a clause dispensing with delivery,[2] and a will or disposition of moveables without such a clause, are effectual when found undelivered in the granter's repositories, or in the custody of a friend or agent to whom the instrument has been intrusted for safe keeping. Up to the last moment of life a voluntary settlement of the granter's estate is held to be ambulatory and revocable, if it has not previously been delivered to the grantee.

Delivery a bar to revocation where vested interest conferred on the grantee.

753. Delivery, it may be affirmed, will not constitute a bar to the revocation of a settlement which reserves thegranter's liferent, unless a beneficial and indefeasible right is conferred by the settlement on a person in existence at the time of delivery. This prin-

[1] *Dickson* v. *Somerville's Trs.*, 3 Macph. 602; 16 May 1867, 5 Macph. (H.L.) 69.

[2] It has been held that a settlement of heritable estate which was not delivered in the granter's lifetime, and which did not contain a clause dispensing with delivery, could not receive effect as a testamentary instrument,—*Anderson* v. *Robertson*, 21 Feb. 1867, 5 Macph. 503; but since the passing of the Titles Act, 1868, such a clause is not essential.

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ciple is established by a series of consistent decisions. Thus, where a postnuptial settlement by spouses was revoked by the wife as *donatio inter virum et uxorem*, and the deed of revocation was objected to on the ground that the settlement conferred certain rights on the lady's daughter, for whose benefit the settlement was alleged to be retained, it was found that the right claimed, not being a vested interest but only a *spes successionis*, did not bar the granter's power of revocation.[1] Again, where a lady, at the suggestion of her friends, on attaining majority and before her marriage, executed a trust-settlement of her whole estate for the benefit of the children of her then intended marriage, whom failing, for her next of kin, reserving her own liferent, which deed she soon after revoked, and granted in place of it an antenuptial contract of the ordinary description, the revocation was sustained.[2] "That a party may grant an irrevocable deed," Lord Rutherfurd observed, "and put it beyond his power by delivery, and vest effectually the property so conveyed against his own subsequent acts and deeds, for the benefit of existing parties in whom by that deed he creates an interest, there can be no doubt. But such a case has no resemblance to the present. . . . There was no beneficiary in whom a *jus quæsitum* could be vested. Upon the principle now contended for, it must have remained good all her life; and was it to be held that by such a deed she could reduce herself directly to the state of an alimentary liferenter merely of her own property, in favour of parties not existing, who never might exist, and whose possible existence was not yet the subject of any contract with any existing party?" The judgment was affirmed by a majority of the Judges in the Inner House for the same reasons.[3] The principle was further extended in the case of *Mackenzie's Trust*,[4] where, under somewhat similar circumstances, a lady on the advice of her agent executed a trust of her property for her own liferent alimentary use, fee to her children, whom failing, to such persons as she might appoint by will. Upon her marriage the lady elected to revoke the trust, and it was found that she was entitled to do so, and to execute a postnuptial contract, although the action was not brought until after the birth of a child of the marriage.

Illustration of the effect of delivery.

754. But again it has been established by a series of decisions

[1] *Fernie* v. *Colquhoun's Trs.*, 20 Dec. 1854, 17 D. 233. The question in what cases heirs or children take a *jus crediti*, or vested right, under marriage-contract obligations, is considered *infra*, Chapter XXXVI., Section III. (Marriage-Contract Provisions).

[2] *Murison* v. *Dick*, 10 Feb. 1854, 16 D. 529.

[3] 16 D. 532. Compare this with *Torry Anderson's* case, 2 June 1837, 15 Sh. 1073, where the question was considered with reference to an ordinary settlement on marriage.

[4] *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027. Contrast with this the case of *Williamson* v. *Boothby*, 1890, 17 R. 927.

Settlements by deed *inter vivos* become effectual by delivery.

equally clear and consistent, that the delivery of a deed to a beneficiary interested in its provisions, or to trustees for his benefit, deprives the granter of the power of revocation, so far as that beneficiary is concerned, if a power to revoke be not reserved. Without going back to the cases in the Dictionary, we may begin with the case of *Turnbull* v. *Tawse*,[1] where a trust was created by a lady for the purpose of conveying the residue of her property to her children *nominatim*, after payment of debts, and under reservation of an annuity to herself. By a supplementary deed the granter attempted to increase the amount of the debt which she had made a burden on her property. Delivery having taken place constructively by causing infeftment to be taken on the deed of provision, it was held that the second deed could not affect the interests of the children under the first deed. In other cases deeds of provision conveying special subjects to a child or children have been delivered to the grantees by the granter, and when so delivered they have been held to give a vested right to the objects of the grant, of which they cannot be deprived by a subsequent revoking, or inconsistent will or deed of provision.[2]

755. In the case of *Smitton* v. *Tod*,[3] a proprietor of heritable subjects, on the narrative that he was incapable, from facility, of profitably conducting his affairs, conveyed all his property to trustees for the purpose, after payment of debts, of providing an alimentary annuity to his wife, to be continued on her death to himself, the residue being destined to the children of the marriage, of whom there were two already born at the date of the deed. The trustees took infeftment and thus obtained delivery of the subject of the provision as well as delivery of the deed of provision. In an action which was afterwards brought to have it found that the deed was a revocable postnuptial settlement, it was held that by the delivery of the deed and the infeftment of trustees for their benefit the children had a vested interest in the estate, and that the deed was irrevocable. For a view of the circumstances which may amount to delivery in the case of a deed which is the subject of correspondence and negotiation between the agent of the granter and the agent of the grantee, reference is made to the

[1] *Turnbull* v. *Tawse*, 15 April 1825, W. & S. 80, reversing 2 Sh. 1. On the other hand, in the case of *Sommerville* v. *Sommerville*, 18 May 1819, F.C., a deed disposing of heritage, and recorded in the Register of Sasines, was held to be presumably revocable on the ground that it disposed of the *universitas* of the granter's estate; and the precedent was followed in *Miller* v. *Dickson*, 11 July 1826, 4 Sh. 822, N.E. 829; and *Fernie* v. *Colquhoun's Trs.*, 20 Dec. 1854, 17 D. 233.

[2] *Napier* v. *Orr*, 18 Nov. 1864, 3 Macph. 57; *Spence* v. *Ross*, 17 Nov. 1826, 5 Sh. 18, N.E. 16.

[3] *Smitton* v. *Tod*, 12 Dec. 1839, 2 D. 225; *Braidwood* v. *Braidwood*, 26 Nov. 1835, 14 Sh. 64; *Robertson* v. *Robertson's Trs.*, 1892, 19 R. 849.

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judgment of the late Lord President in *Tennent* v. *Tennent's Trustees*.[1] The case is too complicated to admit of abridgment, but it may be noted that in this case the deed was recorded in the Books of Council and Session, and in the view of the Court this circumstance, though not conclusive, was very material evidence of constructive delivery.[2] The cases on this subject are elaborately reviewed by the same judge in another important case decided a few years later.[3] To complete this subject it is proper to notice the case of a settlement in favour of spouses in liferent and children in fee. In such a case the taking of liferent infeftment does not interfere with the parent's right of revoking the destination of the fee. The possession given is to the liferenters only, and this does not imply anything equivalent to a delivery of the deed for the benefit of the fiars.[4]

Whether granter's interest *in acquirenda* is excluded by a voluntary settlement.

756. In the further consideration of this subject it is to be observed, that while a truster may, as we have seen, divest himself of property vested in possession by a delivered gratuitous deed, it has not been decided that he may dispose of *acquirenda* in the same manner. In *Wright* v. *Harley*,[5] where there was a general conveyance of *acquisita et acquirenda* in trust for the purposes of alimenting the granter and appropriating the balance of the income to the maintenance of the truster's wife and family, it was held, but only by a majority of the Court, that the interests of the wife and children were preferable to the right of the creditor in a debt contracted after the registration of the deed. The Judges found difficulty in recognising the husband's alimentary interest; and there is force in the observations of Lord Fullerton, who held that the deed was ineffectual against creditors, that it was in substance a mere trust for managing the husband's property, of the nature of an interdiction, and that it was incapable of operating a divestiture of the truster's interest in the property.[6]

Father not entitled to defeat rights of minor children.

757. A settlement conferring a vested right on the pupil children of the granter cannot be revoked by their father in his character of tutor and administrator. Accordingly, where such a revocation was executed by parents, the Court set aside the deed in an action at the instance of the children's representatives, and it was observed that the fact of the children's knowledge of their legal rights during minority lent no support to a plea of homologation in a question with their representatives.[7]

[1] *Tennent* v. *Tennent's Trs.*, 1869, 7 M. 936.

[2] 7 M. 948.

[3] *Spalding* v. *Spalding's Trs.*, 1874, 2 R. 237.

[4] *Stewart* v. *Rae*, 1883, 10 R. 463. The case of *Gilpin* v. *Martin*, 1869, 7 M. 807, is noticed in the last section of Chapter XIV. (Testamentary Writings, how constituted.)

[5] *Wright* v. *Harley*, 2 June 1847, 9 D. 1151.

[6] 9 D. 1159. See *Morrice* v. *Sprot*, 27 June 1846, 8 D. 918.

[7] *Macgibbon* v. *Macgibbon*, 5 Mar. 1852, 14 D. 605.

Obligation or will.

758. A letter or informal writing promising payment of a sum of money to the person to whom it is addressed after the writer's death, will in general be presumed to be a testamentary writing, so that the gift will be defeasible either by a subsequent revoking instrument or by the death of the grantee in the granter's lifetime.[1] But such a writing may confer a right, and may be irrevocable if proper words of obligation are used.[2]

Constructive delivery of settlements.

759. Delivery may be either direct or constructive, as when a deed is delivered to a trustee or custodier as agent for the beneficiary. Without entering on a formal discussion of the subject, it will be sufficient to give a reference to such cases of constructive delivery as illustrate the law in regard to the revocation of settlements.[3] The cases of *Smitton* and *Wright*, already referred to, are examples of constructive delivery by giving infeftment and putting the settlement upon the record.[3] Where the purchaser of an estate or moveable right takes the title in the name of a member of his family, then, unless the security is delivered to the nominee, or something is done to withdraw the instrument from the purchaser's control, the subject remains his property. The rule is nowhere more clearly stated than by Lord Kames in the case of *Hill* v. *Hill*:[4]—"Delivery is in one case only a material circumstance to vouch the establishment or the transference of a right, namely, when the person who delivers has the disposal of the subject, for in that case solely the delivery must import his will to vest his right in another. Hence it is that, when a man lends a sum and takes the bond in name of a child *in familia*, delivery of the bond to the father has not naturally any other signification than that the bond which comes in place of the money is to be under his power, as the money formerly was. It cannot import a delivery for behoof of the child, because the debtor who delivers the bond has no vote in the matter, but must deliver the bond to the father, from whom he got the money."

Presumed delivery to granter's family.

760. The doctrine has been laid down in general terms by writers on the law of evidence,[5] that deeds in favour of the granter's wife or children are effectual without delivery, on the ground that the father of a family is the proper custodier of writings in their behalf. An examination of the authorities tends to

[1] *Trotter* v. *Trotter*, 1 Dec. 1842, 5 D. 224; *Miller* v. *Milne's Trs.*, 3 Feb. 1859, 21 D. 377.

[2] *Duguid* v. *Caddal's Trs.*, 29 June 1831, 9 Sh. 844.

[3] See also Ersk. 3, 3, 91; *Leckie* v. *Leckie*, 1776, M. 11,581; *Tennent* v. *Tennent's Trs.*, *supra*; and see Bell's Com., 5th ed. 276, as to the transfer of the right to moveables by tradition.

[4] *Hill* v. *Hill*, 1755, M. 11,580, quoted with approval in *Walker's Exr.* v. *Walker*, 1878, 5 R. 968.

[5] See Dickson on Evidence, § 939, and cases there referred to.

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show that nothing more is intended by this proposition than that provisions in favour of members of the granter's family, though conceived in the form of deeds *inter vivos*, are effectual if found undelivered in his repositories after his death.[1] It could not seriously be maintained that the retention of the custody of deeds of gratuitous provision by the granter should have the effect of barring his right of revocation; and indeed it would not be known until after his death whether he intended to treat them as delivered deeds.

Deeds in the custody of a trustee presumed to be held for behoof of the grantee.

761. With reference to the doctrine of Lord Stair,[2] that deeds in the hands of a third person are presumed to have been delivered for the grantee's behoof, unless the contrary be proved by the writing or oath of the granter, it is observed by Erskine [3] that in special cases the purpose of such depositation may be proved, not only by the grantee, but by the oaths of the writer and the instrumentary witnesses. He adds:—"After a deed appears in the custody of the grantee, the presumption of delivery to him is so strong that it can in no case be elided but by his own oath or writing, and if the delivery be confessed by the granter or his representatives, the deed becomes the absolute right of the grantee, not to be defeated under the pretence of its having been granted in trust, unless the trust be proved either by the signed declaration or by the oath of the trustee."[4]

Qualification of Erskine's doctrine.

762. On this passage the observation of Lord Colonsay in the case of *M'Aslan* v. *Glen* appears to be well founded:—"The doctrine of Erskine upon this subject," he says, "is not to be taken without qualification, otherwise it is not very clear on what ground an issue could be granted; for the matter would be reduced to a presumption in favour of the grantee, which is not the state of the law as an absolute proposition. A party may have possession of a deed, and the presumption of law may generally be that—that party being the beneficiary under the deed—it was delivered to him for the purpose of being so held by him. But that proposition may undergo many qualifications, and the whole circumstances of each case must be looked at."[5] The deposit of a settlement or deed of gift with a custodier who is agent for the granter and the grantee is not presumed to be made for the purpose of delivery, except in the limited sense that the deed may be effectual if produced unrevoked at the granter's death.[6]

[1] Stair, 1, 7, 14; Ersk. 3, 2, 44; Bell's Pr. § 24; *Forrest* v. *Wilson*, 1 July 1858, 20 D. 1201; and see *Downie* v. *Mackillop*, 5 Dec. 1843, 6 D. 180.

[2] Stair, 4, 42, 8.

[3] Ersk. 3, 2, 43; Dickson on Evidence, § 977, and cases there cited.

[4] See Dickson on Evidence, § 960 *et seq.*

[5] *M'Aslan* v. *Glen*, 17 Feb. 1859, 21 D. 513. See also the cases upon the law of agents' lien or hypothec. Digest, *voce* Agent and Client.

[6] Ersk. 3, 2, 43; Bell's Pr. § 23; *Ramsay* v. *Cowan*, 1833, 11 S. 967.

SECTION II.

Mutual Wills and Settlements, and Wills founded on Agreement.

763. The frequency of what are called mutual settlements is a peculiarity of the habits of Scottish people rather than of the law of Scotland, and it must be observed that if spouses and sisters living in community discover a predilection for joint action in the matter of making a will, this tendency is not infrequently followed by a reaction in which the survivor wishes, if possible, to dispose of the property of both.

Mutual will in general equivalent to two wills.

764. After much controversy, it may be taken as settled, that in the absence of expressions importing reciprocal obligations and a contract, a mutual will is neither more nor less than two wills in one instrument, and the construction of such an instrument consists in separating the wills of the two testators, and giving full effect to the wishes of each with respect to his individual estate. Nor, so far as the writer can discover, is there any difference in the principle of construction to be applied to mutual wills or trust-settlements by spouses and those which are executed by sisters, or it may be by two friends who may wish to settle their affairs in concert. If a settlement by spouses confers reciprocal benefits which are manifestly unequal, it may be revoked or set aside as a donation, but the right of revocation on such grounds is not considered in this work, and we here suppose a settlement such as the law will support.

Mutual wills which do not contain element of contract.

765. (1.) If a mutual will does not contain an element of contract, each party retains the right to revoke the bequests of his property in whole or in part, and it makes no difference that the will is to be administered by trustees, or that it contains a power of revocation limited to the joint lives of the testators, and to be exercised by their joint act. This rule is illustrated by the case of a mutual will where the whole property disposed of belonged to one of the testators, who was accordingly found to have the right of revoking the mutual will altogether.[1] Of course, if the provisions of the mutual settlement are contractual, the contract must receive effect; and the most general rule to be extracted from the decisions (but rather by implication than by express statement) is that reciprocal provisions in favour of the granters are presumed to be contractual, but that this presumption does not extend to the provisions in favour of third parties. In regard to

[1] *Stiven* v. *Brown's Trs.*, 1873, 11 M. 262.

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these, it must appear from the will or instrument that it was a term of the contract that the testamentary part of the instrument should not be altered.

Wills which give the survivor the fee.

766. (2.) The ordinary ground or reason for entering into an arrangement of the nature of a mutual settlement is that the parties are desirous as matter of contract to secure to the survivor a certain interest in the estate of the predeceaser. Now, if the mutual settlement includes a destination of the estate of the predeceaser to the survivor in fee, whom failing, to other parties, then, unless the destination is protected by being made matter of contract (which will not be presumed), the substitution is defeasible by the will of the survivor.[1] But there are exceptional cases where the ultimate succession is intended to be secured by the machinery of a trust, and if the Court is satisfied that the destination is matter of contract, then the contract, whatever it is, must receive effect. For example, the contract may be that the survivor shall have the power of spending the money, and yet that he shall not be entitled to defeat the destination by his gratuitous deed.[2]

Wills which give the survivor a life interest.

767. (3.) The more usual arrangement for the benefit of the testators is that the survivor shall enjoy the liferent or income for life of the settled estate, subject, it may be, to a power of revocation by the joint act of the parties. Such a contract is in effect a species of mutual assurance, and it is presumed to be contractual, so that neither party can alter his will in such a way as to lessen the expectant interest of the other in his estate. But just as clearly is it presumed, in the absence of contrary indications, that the power of disposal of the fee, subject to the contingent life interest, remains with the respective granters of the mutual settlement.[3] Hence, if the settlement contains separate destinations of the fee, the survivor may alter the destination of his own estate, but cannot interfere with the disposition of the predeceaser's estate.[4] And again, if the estates have been massed together, and one-half of the aggregate estate disposed of by each party, the survivor's power of revocation is confined to the one-half which is destined to his relations or to objects designated by himself.[5] In such cases the form and phraseology of the clause reserving power

[1] Sp. Ca. *Davidson*, 1870, 8 M. 807; *Nicoll's Exrs.* v. *Hill*, 1887, 14 R. 384, where the ground of judgment was that such a substitution was not a "protected succession,"—see p. 389.

[2] *Craick's Trs.* v. *Mackie*, 1870, 8 M. 898.

[3] *Nimmo's Trs.* v. *Hogg's Trs.*, 1840, 2 D. 458; *Traquair* v. *Martin*, 1872, 11 M. 22.

[4] *Lang* v. *Lang*, 1885, 12 R. 1265; *Welsh's Trs.* v. *Welsh*, 1871, 10 M. 16; *Kay's Trs.* v. *Stalker*, 1892, 19 R. 1071.

[5] *Kerr* v. *Ure*, 1873, 11 M. 780. In any case, savings out of liferent are always disposable; *Morris* v. *Anderson*, 1882, 9 R. 952.

to revoke has not been treated as very important, and, for example, a general power to the longest liver to revoke and alter is presumed to have relation to his own estate or contribution to the settled fund,[1] and where, through misapprehension, the estates have been mixed, the heirs of the predeceasing settlor may require a rectification of accounts and separate investment.[2]

Wills where rights given to heirs are contractual.

768. (4.) With respect to settlements in which the rights given to heirs of the destination are contractual, the best illustration is the case of one of the spouses making a provision for the heirs of the other. The contract in each case must be found in the words of the instrument, and no general rules can be given.[3] The judgment of Lord Cairns in the case of *Costine* [4] is an interesting example of the discrimination of what is contractual from what is testamentary and revocable in a will which was founded to some extent on an agreement. Even where the granters are spouses, and the heirs are their children, it cannot be said that there is any general rule against alteration by the survivor to the extent of his or her individual estate.[5] The granters of a mutual settlement may, of course, reserve to themselves the power of separate revocation under such conditions as they think fit. The reservation is sometimes in the form of a power to each of the parties to revoke to the extent of their respective interests. In the construction of a power so expressed,[6] it was held that a general revocation of a mutual settlement by one of the parties implied a revocation of every bequest contained in it to the extent of that party's interest in the subject of conveyance, and not a mere withdrawal of one-half of the estate from the operation of the settlement. Had the latter construction been adopted, all the pecuniary legacies must have been paid in full, and the loss would have fallen wholly on the residuary legatees, whereas, on the construction which was adopted, legacies as well as shares of residue were diminished in rateable proportion.

Doctrine of constructive delivery of mutual settlements.

769. Mutual settlements are usually classed within the description of deeds such as are held to be either constructively delivered, or to be effectual without delivery.[7] The case of *Brown*

[1] *Welsh's Trs.* v. *Welsh*, *supra*.

[2] *Renton's Trs.* v. *Alison*, 1876, 3 R. 1142.

[3] See *Graeme* v. *Graeme's Trs.*, 1869, 7 M. 1062; *Greenoak* v. *Greenoak*, 1870, 8 M. 386; *Hogg* v. *Campbell*, 1863, 1 M. 647; *Paterson* v. *Paterson*, 1893, 20 R. 484.

[4] *Wightman* v. *Costine*, 1878, 6 R. (H.L.) 13.

[5] *Main* v. *Lamb*, 1880, 7 R. 688; *Lang* v. *Brown*, 1867, 5 M. 789; *Dickson* v. *Somerville's Trs.*, 3 M. 602, and 1867, 5 M. (H.L.) 69. See *Anderson* v. *Garroway*, 1837, 15 S. 435; *Kidd* v. *Kidd*, 1868, 2 M. 227.

[6] *Wilsone's Trs.* v. *Stirling*, 13 Dec. 1861, 24 D. 163. Compare this case with *Bisset* v. *Walker*, 1799, M. "Deathbed," App. No. 2.

[7] *Fernie* v. *Colquhoun's Trs.*, 30 Dec. 1854, 17 D. 233.

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v. *The Advocate-General*[1] may be referred to in illustration of the principle of the constructive delivery of mutual settlements. The appellants, along with their deceased sister, had executed a mutual settlement of their whole estate and effects in favour of each other, and of the heirs and assignees of the last survivor. Lords Jeffrey and Cuninghame, in the Court of Exchequer, decided that this was a testamentary disposition, and therefore chargeable with legacy duty, but the judgment was reversed in the House of Lords, on the ground that the disposition was delivered, and therefore an irrevocable conveyance *inter vivos* of the joint estate. Lord St. Leonards observed,—"The debts provided for by this instrument are such as might be contracted by any of the sisters during their lives; and I think it clear that those debts were a charge not upon the share of each only, but a charge upon the whole fund. It was argued at the bar that that would lead to great absurdity and inconvenience. It might; but it was not an illegal provision, and it must be remembered that these ladies were not likely to feel any embarrassment from such a stipulation."[2] The rule that a mutual deed does not require delivery applies to mutual deeds executed in duplicate.[3]

SECTION III.

Rights under Marriage Settlements, whether Contractual or Revocable.

770. The subject embraces two heads of inquiry,—*first*, who are the beneficiaries under a marriage-contract who have contractual rights in the settled property? and *secondly*, in what circumstances, with regard to vesting and consents, may a settlement in consideration of marriage be revoked?

Contractual rights, how classified.

771. I. Those rights are presumed to be contractual which are (1) given or promised by one of the spouses, or a parent, to the other spouse;[4] or (2) given or promised to the children or issue of the marriage; and (3), where it appears from the settlement itself that rights arising to third parties (*e.g.*, children of a previous marriage or next of kin) are part of the stipulations of the contract by which the spouses intended to be bound, such rights will be protected

[1] *Brown* v. *The Adv.-Gen.*, 28 June 1852, 1 Macq. 79; reversing judgment of C. of Ex., 3 Feb. 1849, Exch. Rep.

[2] 1 Macq. 90. See *Wilsone's Trs.* v. *Stirling*, 13 Dec. 1863, 24 D. 163.

[3] *Robertson's Trs.* v. *Lindsay*, 1873, 1 R. 323.

[4] A voluntary deed adopted by reference in a contract of marriage is *pars contractus*; *Williamson* v. *Boothby*, 1890, 17 R. 927; otherwise, such a deed is in general revocable after marriage; *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027.

against the voluntary acts of the spouses in derogation of the contract.

Law as to contractual rights of grandchildren.

772. The question whether grandchildren of the spouses (or issue in any degree) are entitled to contractual interests has been resolved in the affirmative by the judgment of the House of Lords in the very important case of *Macdonald* v. *Hall*.[1] By antenuptial contract of marriage Andrew Hall conveyed to his promised spouse in liferent, for her liferent use allenarly, subject to restriction as after mentioned, and to the child or children of the said intended marriage, *and the issue of the bodies of such children*, whom failing, to his heirs and assignees his whole estate; then followed the singular qualification that, in case there should be no children of the marriage, or no living child at the dissolution thereof, the liferent provision in favour of the wife should be restricted to an annuity of £150. Mrs. Isabella Hall or Macdonald, the only child of the marriage, died during the subsistence of the marriage, survived by a son, the appellant. Andrew Hall died, survived by his wife and this grandson. By his testamentary settlement he gave a liferent of his whole estate to his wife, a legacy of £5000 to his grandson, and the balance to collateral relatives. In the Court of Session it was held (contrary to the view of the Lord Ordinary, Lord Kincairney) that the issue of the children of the marriage had no contractual rights, and accordingly that Andrew Hall had power to remove the restriction of his wife's liferent, and also to dispose of the fee as he pleased, although the effect of these testamentary acts was to lessen proportionately the benefit taken by the grandson. In the House of Lords the appellant consented that his grandmother should have her liferent of the whole estate, and maintained that he could not be deprived of the fee. Their Lordships were unanimously of opinion that provisions in favour of the "issue" of the marriage (including "every person lineally descended of the marriage") are within the consideration of marriage, and are practional. The *dicta* in Erskine and Bankton[2] were interpreted in this sense, and two cases were founded on, in one of which an antenuptial obligation to provide, and in the other a conveyance of heritable estate in an antenuptial contract in favour of the heirs of the marriage, were held to confer rights on the grandchild and heir which could not be defeated by subsequent voluntary deeds.[3] It might be urged that these cases are inconclusive, because of the known principle that where heritable estate is settled on the con-

[1] Reported as *Macdonald* v. *Scott*, 24 July 1893, L.R. Ap. Ca. 642, reversing 19 R. 567.

[2] Ersk. 3, 8, 38-39; Bankton, 1, 5, 9, 15.

[3] *Stewart* v. *Graham*, 1744, 1 Pat. 364; *Macleod* v. *Macleod*, 1828, 6 S. 1043.

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sideration of marriage on a series of heirs, an obligation not to alter the succession is presumed, a principle which was frequently invoked in support of unrecorded entails. But it would be very useless to inquire further as to the history of the onerosity of grandchildren's provisions, because the principle is now established by a decision of the highest authority, supported by powerful reasoning; and, it may be added, the principle as established can only work beneficially, while its limitation to immediate issue might cause the disappointment of well-founded expectations and actual hardship. Spouses may of course frame their contracts so as to confine the benefit of their obligations to the immediate issue of the marriage, should such be their desire.

Destination to children and grandchildren.

773. The claim of the grandchild in *Macdonald* v. *Hall* was founded on conditional institution, but there can be no doubt as to the application of the principle to a destination to children of a marriage in liferent and to their issue in fee, protected by a trust. In such a case the grandchildren will be within the scope of the contractual provisions of the deed.

Whether contract defeasible by joint act of father and son.

774. In the case of a settlement of heritable estate in consideration of marriage, the parent being fiar, grandchildren have a prospective interest either as conditional institutes, or as substitutes.[1] It is plain enough that if a son or immediate heir of the marriage survives his father, the father may defeat the substitution by disponing the estate. Nevertheless, the grandson would seem to have an interest to prevent the settlement being gratuitously altered by the settlor to the prejudice of his chance of succession. But the Court and the House of Lords in *Routledge* v. *Carruthers*[2] held that the maker of a marriage-settlement, by arrangement with his son, might discharge the obligation in favour of the heir of the marriage, and that the same effect might be accomplished by the father propelling the fee to his son. It is evident that this decision cannot be reconciled in theory with *Macdonald* v. *Hall*, and the Lords who considered the last-mentioned case treat *Routledge* as an anomalous case, Lord Watson pointing out that the decision was equally adverse to the contingent rights of younger children as to those of grandchildren.[3]

775. In the cases in which a grantee under a marriage-contract

[1] See 45 and 46 Vict., cap. 53, § 17; and Petition *Scott Douglas*, 1883, 10 R. 952.

[2] *Routledge* v. *Carruthers*, 19 May 1812, F.C.; *Majendie* v. *Carruthers*, 16 Dec. 1819, F.C.; June 1820, 2 Bligh, 692, 4 Dow, 392.

[3] In connection with this subject the following cases were referred to in the previous edition,—*Trail* v. *Trail*, 1737, M. 12,985; *Monro* v. *Gordon*, 1760, 5 Br. Sup. 880; *Fotheringham* v. *Ogilvie*, 1797, M. 12,991; *Maconochie* v. *Greenlee*, 1780, M. 13,040; *Cunninghame* v. *M'Leod*, 13 Aug. 1846, 5 Bell, 210; *Fernie* v. *Colquhoun's Trs.*, 1854, 17 D. 233; *Murison* v. *Dick*, 1854, 16 D. 529.

Contractual interests of grantees in general.

is able to claim a contractual or indefeasible right, that right must arise either from the relation in which the grantee stands towards the parties to the contract, or from express obligation, or from the circumstance that one of the parties at the time of the marriage (or, it may be, during its subsistence) has made over property to trustees for the benefit of the grantee. An example of an indefeasible right acquired under a contract of marriage by children of a previous marriage is furnished by the case of *Mackie* v. *Gloag's Trustees*.[1] The deed was in the form of a contract, but the settled property was the property of the wife, and after securing her own liferent interest in it by means of a trust, the lady directed her trustees to hold the trust-estate "for behoof of the children procreated or to be procreated" of her body, subject to the usual power of division. On this conveyance the trustees were immediately infeft. There were no children of the marriage, and the question was as to the validity of certain testamentary writings of the settlor, Mrs. Gloag, by which a part of the settled property was taken away from the children of the first marriage, who, it will be observed, were comprehended in the destination. The Court by a majority (Lord Rutherfurd Clark dissenting) held that the destination was revocable as regards the interests of these children. The House of Lords, while indicating that by the form of the destination the wife's existing children were brought within the consideration of marriage,[2] decided the case on the more general ground that, irrespective of the circumstance that the deed was granted on entering into marriage, it was a deed of trust followed by infeftment and possession, and without a reserved power of revocation, and that it was therefore effectual as a gift of the lands to the beneficiary in whose favour it was granted.[3]

Effect of postnuptial in competition with antenuptial provisions.

776. In closing this part of the subject, it may be stated, in the words of Mr Erskine,[4] that "where the interests of the husband and wife have been settled by antenuptial contract, postnuptial deeds are revocable, in so far as they either add to or diminish the provisions of the first contract without a valuable consideration on the other part,"[5] to which it may be added that postnuptial contracts are reducible at the instance of the issue of the marriage in so far as prejudicial to the interests secured to them by antenuptial

[1] *Mackie* v. *Gloag's Trs.*, 6 Mar. 1884, 11 R. 10, reversing 10 R. 746.

[2] See p. 13, per Lord Chancellor.

[3] 11 R. (H.L.), pp. 14, 17, 18. See *Ferguson's Curator* v. *Ferguson's Tr.*, 1893, 20 R. 835.

[4] Ersk. 1, 6, 30; *Rae* v. *Nielson*, 1875, 2 R. 676; Sp. Ca. *Beattie's Trs.*, 1884, 11 R. 846.

[5] But such a postnuptial contract proceeding on the narrative that the antenuptial contract of the parties was no longer suitable, if allowed to stand unrevoked, is still a contract, and will be construed as such, and not as a testamentary deed; *Buchanan's Trs.* v. *Whyte*, 1890, 17 R. (H.L.) 53.

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contract. The subject of *donatio inter virum et uxorem* does not fall within the scope of this work, but it ought to be pointed out as an apparent, but only an apparent, exception to this statement of the law, that where the wife's interest is not protected by means of a trust, her deed alienating her separate estate in favour of a third party for a valuable consideration is effectual, and that the purchaser is not bound to see to the application of the price.[1]

Antenuptial settlement revocable only when wife has an unqualified fee.

777. II. If the question can be considered as still open for consideration, it may be doubted whether an antenuptial settlement in trust ought ever to be treated as revocable during the subsistence of the marriage in relation to the wife's interest. The unique case or condition in which such revocation has been held competent, is that of an estate held in trust for the wife in fee, and in which the husband either never had, or has ceased to have, a life interest.[2] In the first of the cases cited, the husband had a liferent contingent on his survivance of his wife, which he offered to renounce; in the second, the income of the estate during the subsistence of the marriage was payable to the husband, and had been attached by his creditors. Then the wife successfully claimed the right to revoke the trusts, in the character of sole beneficiary, Lord Deas dissenting in both cases on the ground that a trust constituted for the wife's protection ought to be treated as irrevocable during the subsistence of the marriage in accordance with the agreement of the spouses. The principle of the case of *Ramsay's Trustees* is that if the purposes of the marriage-contract have either failed, or are satisfied, then it will follow that the estate which has been conveyed in order to secure the provisions of the contract becomes absolutely the property of the person who conveyed it.[3]

How the wife's estate may be completely protected during the marriage.

778. From these cases the conveyancer will learn that if it is desired that the wife's estate should be protected against marital influence, the first purpose of the trust must be the payment of the income to the wife for life for her separate use, the fee being only given to her in the event of the marriage being dissolved without issue surviving. The rights of the issue of the marriage may be made subject to a qualified power of disposal in the wife. The case of *Torry Anderson*,[4] and the very important decision in *Menzies* v. *Murray*,[5] establish the principle that a trust for such purposes is not revocable *stante matrimonio*, either as to the liferent use, or as

[1] *Standard Property Investment Co.* v. *Cowe*, 1877, 4 R. 695.

[2] *Ramsay* v. *Ramsay's Trs.*, 1871, 10 M. 120; *Laidlaw* v. *Newlands*, 1884, 11 R. 481.

[3] Per the Lord President Inglis, 18 R. 137.

[4] *Anderson* v. *Buchanan*, 1837, 15 S. 1073.

[5] *Menzies* v. *Murray*, 1875, 2 R. 507 (Court of Seven Judges). See also *Pringle* v. *Anderson*, 1868, 6 M. 982; Sp. Ca. *Hope*, 1870, 8 M. 699.

to the destination of the fee; and it is of no consequence that the lady is stated to be of advanced age, and without the expectation of issue. In order that the trust may be effective, it is not in the least necessary that it should be declared irrevocable; and indeed, if the trust be intrinsically revocable, as in the cases of *Mackenzie*,[1] *Ramsay*, and *Laidlaw*,[2] it will not be saved by a promise made by the granter to herself that she will not revoke it.[3] The essential point is, that an interest in the estate should be given to the issue of the marriage; because, in a question of the power to revoke, it will neither be assumed during the marriage that there is no further prospect of issue, nor after its dissolution that all possible interests in the fee are represented by a surviving child.[4] When the fee is thus settled, the trust will be effective, however the income may be directed to be applied, and it is not necessary for this purpose that the life interest of the spouse or spouses should be declared alimentary.[5] Such a declaration, of course, may be very useful in protecting the income of the trust against the claims of creditors. There does not seem to be any essential difference, as to the conditions necessary to make a trust effective, between the cases of a settlement made by the wife or her father, and a settlement made by the husband for the benefit of the wife and children of the marriage, subject to his own liferent. In the cases cited, the two trusts are for the most part separately considered, and are determined on common principles.

Postnuptial settlements are effectual *intra familiam.*

779. The point that the wife does not become fiar, and is not entitled to revoke merely in consequence of the reservation of a power of testamentary disposition, is determined by the case of *Peddie*,[6] in which case the judgment was delivered by Lord Rutherfurd Clark, and which is also the latest authority for the extension of the principle of the indissoluble character of a properly framed marriage trust to postnuptial contracts. "In a question with creditors, a postnuptial marriage-contract may not have the same power as an antenuptial marriage-contract; but, *intra familiam*, I think it has. Marriage-contracts, whether antenuptial or postnuptial, are entered into for the same purposes and ends, and should, I think, have the same legal effect where the interest of third parties is not involved."[7]

[1] *Mackenzie* v. *Mackenzie's Trs.*, 1878, 5 R. 1027.

[2] *Supra*, § 767, note 2.

[3] See the opinions of Lord Moncreiff, 2 R. 511, and Lord Deas at p. 512.

[4] *Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.), 33.

[5] See the destination in *Menzies* v. *Murray*, *supra*.

[6] *Peddie* v. *Peddie's Trs.*, 1891, 18 R. 491.

[7] 18 R. 495; *Allan* v. *Kerr*, 1869, 8 M. 34; *Low* v. *Low's Trs.*, 1877, 5 R. 185.

CHAPTER XXIII.

OF DONATIONS.

1. Donation or Trust. | 2. Donation, whether Absolute or Mortis Causa.

SECTION I.

Donation or Trust.

Limits of the subject.

780. *Mortis causa* gifts only fall strictly within the scope of this work. But the cases of this class cannot usefully be considered independently of the law of Donation in general, and for this reason, that as a preliminary to all legal questions the alleged donee is always set to prove the donation, and it is only in the case of the gift being proved—which is not the most frequent alternative—that the question arises whether the gift is absolute, or is a gift made under conditions which place it in the category of *donatio mortis causa*. Under this head it is proposed to consider the assemblage of cases in which the holder of a sum of money, or document representing money which belonged to a defunct, claims the right to retain or draw the money upon the title of donation.

What are the subjects which may be transferred by donation without writing.

781. With few exceptions, the cases of donation which come before the Courts have relation to money represented by bankers' receipts. It is indeed theoretically possible to make a *donatio mortis causa* of any subject, moveable or immoveable; but then, if the subject be heritable estate, or invested money, such as stocks, heritable or moveable bonds or debentures, not being obligations payable to bearer, the gift could only be made in writing; and if an assignment, expressed to be conditional on the death of the cedent, were produced by the assignee after the cedent's death, it is not likely that any question would be raised as to the delivery of the instrument, such delivery being consistent with the granter's expressed intention and the probabilities of the case. Again, in the case of an *ex facie* unconditional assignment bearing to be granted for love and favour to the grantee, or granted *intuitu mortis*, it may be affirmed that, with the doubtful exception of heritable estate, the subject of assignment will vest without delivery, and without a clause dispensing with delivery on the granter's death. And the result will be the same, if, instead of a separate deed of

assignment the creditor in the security shall have caused the name of the donee to be inserted as purchaser or conditional institute in the document of title, as the writer has shown in the fourth section of the Chapter on the Constitution of Testamentary Writings.[1]

Deposit-receipts.

782. Thus the operation of the principles of law and the presumptions applicable to donation is in practice confined to gifts of money and corporeal moveables, the testator's money being in Scotland most usually in bank, and represented for the purposes of donation by a banker's receipt.[2]

Destination in such receipts has no testamentary effect.

783. Here it may be convenient to note that it has been settled by a uniform and unquestioned series of cases that no testamentary effect can be given to a destination inserted in a deposit-receipt. The four cases noted may suffice for purposes of reference,[3] and it may be pointed out that the reason is that no higher effect can be attributed to a conditional institution in an instrument of title than would be given to a separate assignment. Now, a receipt for money is not an assignable or negotiable instrument, and whether we consider the case of a receipt originally expressed to be granted to A. and B. or the survivor, or the case of a receipt originally granted to A., and indorsed by him into the name of B., if the money be the property of A., then B. takes nothing on the face of the instrument but a mandate from A. to draw the money, which falls by the death of the mandant.

Elements of a donation: intention and delivery.

784. Passing to the main question, the mode of constitution of a gift or donation, it is matter of ordinary experience that this in the case of money or moveables usually includes two elements, the expressed intention to make a gift, and the delivery of the subject. The first of these elements would seem to be essential in a case of proper donation, as distinguished from that of a gratuity for services rendered, where, the intention and the cause of granting being known to both parties, its expression may be

[1] Chapter XIV., Section IV.

[2] Money in an account-current kept by the testator himself may be the subject of a claim of donation. See *Smith* v. *Smith's Trs.*, 1884, 12 R. 186. To this category also belong the cases of gratuitous indorsations of bills of exchange with a *quasi*-testamentary intention, as to which see the cases of *Murray* v. *Todd*, 6 March 1818, Hume, 275; *Adam* v. *Johnston*, 1782, M. 1416; *Steel* v. *Wemyss*, 1793, M. 1409; *Anonymous*, 1752, 5 Br. Sup. 802. A bill payable after death is, of course, not a habile mode of constituting a bequest, as this is not the case of a transference of a security with the intention of constituting a gift or bequest, but is an attempt to give to the bill itself a testamentary operation contrary to the legitimate purpose of the instrument; *Fulton* v. *Blair*, 1722, M. 1411; *Hutton* v. *Hutton*, 1724, M. 1412; *Wright* v. *Wright*, 1761, M. 8088; *Dowie* v. *Millie*, 1786, M. 8107; *Milne* v. *Grant's Exrs.*, 1884, 11 R. 887.

[3] *Cuthill* v. *Burns*, 1862, 24 D. 849; *Watt's Trs.* v. *Mackenzie*, 1869, 7 M. 930; *Miller* v. *Miller*, 1874, 1 R. 1107,—all cited with approval in *Crosbie's Trs.*, 7 R., at p. 826, and *Jamieson* v. *M'Leod*, p. 1135 of same volume.

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Proof of intention.

dispensed with. In the cases that have come before the Court after a proof, the chief topic of contention has almost always been, with what intention was the money or the banker's receipt delivered, whether as a gift, or in trust for the granter's heirs; and notably in *Sharp* v. *Paton*,[1] a case which has had considerable influence on the law of the question, the intention to make a donation was held not proved, for this reason, amongst others, that the expressions reported to be used by the deceased were consistent with the supposition that the money was given to the defender to be administered as his property. Keeping in view that the presumption of law is adverse to donation, it may be safely asserted that a donation can in no case be held to be established without a verbal or written declaration on the part of the donor of his intention to make a gift to the person to whom the subject is to be transferred, but this declaration may be made to a third person on behalf of the donee.[2]

Proof of delivery in all cases essential to donation.

785. It must be admitted that, in the words of Lord Kames,[3] delivery by the person who has the disposal of the subject is "a material circumstance to vouch the establishment or transference of a right." With one doubtful exception, no donation has been held proved against the representatives of an alleged donor without evidence of the delivery of the document of debt. In the case referred to[4] the Lord Ordinary (Rutherfurd Clark), while satisfied of the intention to make a gift, which he said was clear as day, rejected the claim of the donee because the deposit-receipt was not delivered, the fact being that the paper was found, not in the house of the deceased, to whom it belonged, but in the house of his brother-in-law, in a parlour, in a drawer among articles of very little value, with which the deceased had no concern. In his speech in this case, the late Lord President took occasion to qualify his statement (as reported) in *Morris* v. *Riddick*,[5] to the effect that our law differed from the Roman law of *donatio mortis causa* in requiring delivery, and suggested a restriction of the rule requiring delivery to the cases of gifts of money and corporeal moveables, or at least a relaxation of the rule in cases where the name of the claimant is inserted in the body of the receipt. The case of *Gibson* v. *Hutchison*,[6] referred to by Lord Mure, does

[1] *Sharp* v. *Paton*, 1883, 10 R. 1000, see p. 1007. Other instances where the case on donation failed for want of evidence of intention are, *Keddie* v. *Christie*, 1848, 11 D. 145; *Cruickshanks* v. *Cruickshanks*, 1853, 16 D. 168; *Connell's Trs.*, 1886, 13 R. 1175.

[2] *Lord Advocate* v. *Galloway*, 1884, 11 R. 541; *Crosbie's Trs.* v. *Wright*, *infra*; *Gibson* v. *Hutchison*, 1892, 10 R. 933.

[3] In *Hill* v. *Hill*, M. 11,580.

[4] *Crosbie's Trs.* v. *Wright*, 1880, 7 R. 823.

[5] *Morris* v. *Riddick*, 1867, 5 M. 1036.

[6] *Gibson* v. *Hutcheson*, 1872, 10 M. 923, where the late Lord President who

not lend any solid support to these views, because there the money was already lodged in bank in name of the wife, the donee, and no further delivery was possible. Notwithstanding the decision in *Crosbie's* case, delivery has in all subsequent cases been insisted on as a necessary element of the donee's proof;[1] and there can be little doubt as to the tendency of legal opinion on this point. It is thought that the true view of *Crosbie's* case (if the decision be sound), is that it is a case of constructive delivery through the intervention of a third person, and the Lord President himself classed the case amongst those in which delivery was unnecessary because the subject was vested in the donee.[2]

Donation not proved by evidence of donee or his family.

786. Apart from the question of the necessity of the two elements of declared intention and delivery, actual or constructive, there is not much law in the subject. The cases usually resolve into a conflict of testimony; the old practice of sending the question of fact to a jury[3] has been abandoned in favour of proof before a judge. One result of this has been the enforcement of the presumption against donation, "which requires very strong and unimpeachable evidence to overcome it."[4] especially when the effect would be to revoke a regular settlement.[5] To this it may be added that there must in general be some *independent* corroboration of the testimony of the alleged donee or donees. The opinion of the writer on this point is expressed in the following passage: "If it were open to us to reconsider the matter, I should doubt whether the Court would now sanction the principle by which money in bank vouched by a deposit-receipt is held to be well transferred by handing over or pointing to the receipt. I ventured in the case of *Sharp* to suggest what appeared to me to be a reasonable limitation, viz., that we should not sustain a case of deathbed donation where it is supported by no evidence other than that of the alleged donee, and of persons subject to his or her influence. That view was adopted by the Court on a full con-

dissented from the judgment, and held donation not proved, used the words, "I do not think that actual delivery is necessary to make a donation *mortis causa* effectual, *especially if the money stands in the name of the donee.*" A very similar case is that of *Thomson's Exr.* v. *Thomson*, 1882, 9 R. 911.

[1] See the observations of the Lord President in a case in 19 R. p. 272: "In all previous cases of the kind there has been at least some act of the deceased donor which is admitted or proved by real evidence to have taken place," &c. In the same case the writer observed that some of the previously decided cases "came dangerously near to the point of giving effect to a nuncupative will." The transfer of the deposit in the books of the bank is good constructive delivery; *Cruickshanks* v. *Cruickshanks*, 1853, 16 D. 168.

[2] In *Blyth* v. *Curle*, 12 R. at pp. 681-2.

[3] *Kennedy* v. *Rose*, 1863, 1 M. 1042; *Muir* v. *Ross' Exrs.*, 1866, 4 M. 820; *British Linen Co.* v. *Martin*, 1849, 11 D. 1004.

[4] Per Lord President Inglis in *Sharp* v. *Paton*, 1883, 10 R. 1006.

[5] *Ross* v. *Mellis*, 1871, 10 M. 197, at p. 200.

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sideration of all the authorities."[1] It may be added that the case of a receipt taken originally in the name of the claimant, or of the defunct and the claimant jointly, is always more favourably considered than that of a receipt in name of the defunct himself produced by the alleged donee. All the recent decisions emphasise this distinction.[2]

SECTION II.

Donation, whether Absolute or Mortis Causa.

Importance of the subject.

787. *Donatio mortis causa*, while recognised by the institutional writers,[3] and illustrated by cases in the early reports,[4] has only within the last thirty years become familiar to Scottish lawyers as a customary mode of transferring property *intuitu mortis*. Since the publication of the last edition of this book, more than twenty claims of donation made after the death of the donor have been heard and decided in the Inner House, the greater number of which, if successfully maintained, would have been referred to the head of *donatio mortis causa*. This selection probably represents a much larger number of claims which have been admitted by executors, either because they were satisfied of the justice of the claims, or it may be because the persons interested in the succession were unwilling to enter into contentious litigation with claimants whose statements could not easily be tested or neutralised. As already indicated, the development of this new chapter of the law is connected with the practice of depositing money in bank on the security of receipts which bear interest, and are transferable by indorsement and delivery.

Definition of *donatio mortis causa*.

788. The conditions of such donations have been variously defined; but while appreciating the distinctions which have been taken between donation in our law, and the same right as it exists under other legal systems, the writer desires to point out that, as our law recognises such a thing as the unqualified and unconditional transfer of money and moveables by donation, it necessarily

[1] *Dawson* v. *M'Kenzie*, 1891, 19 R. 271, 276. To the same effect is the observation of Lord Moncreiff in the case of *M'Neil* v. *M'Dougall:* "The only evidence here is that of the alleged donee, and that cannot be held as sufficient, otherwise there would be no such thing as presumption against donation;" 17 R. 29. There is, however, a case of a contrary tendency, *Macdonald* v. *Macdonald*, 1889, 16 R. 758.

[2] In the two following cases the question was, donation or *loan; Anderson's Trs.* v. *Webster*, 1883, 11 R. 35; *Malcolm* v. *Campbell*, 1889, 17 R. 255.

[3] Stair, 3, 8, 43; Ersk. 3, 3, 91; Bankton, 1, 9, 16-18 (vol. i. p. 230).

[4] See, for example, *Mitchell* v. *Wright*, 1759, M. 8082; *Whiteford* v. *Ayton*, 1742, M. 8072; and the earlier case of *Irvine* v. *Skeen*, 1707, M. 6350, where the donation was held to be ineffective, because the donor survived the donee.

also recognises their conditional transfer by the same title, provided the fund or moveable subject is delivered, *i.e.*, brought immediately under the dominion of the donee. It follows that the conditions of the gift may not be quite the same in every case, and yet the gifts may be valid according to the conditions expressed.[1] Nevertheless, as in the case of a deathbed gift we do not look for an exact record of what is said, and as it is necessary to consider what is implied as well as what is expressed, it is desirable to have a definition of the ordinary conditions of a *mortis causa* gift. From this point of view, the definition given by the late Lord President in *Morris* v. *Riddick*[2] seems unexceptionable, and it has stood the test of a considerable number of actual cases to which it has been applied. The definition, as reported, is this:—"*Donatio mortis causa* in the law of Scotland may, I think, be defined as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and failing such revocation, then for the grantee on the death of the granter. It is involved, of course, in this definition, that if the grantee predecease the granter the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease. Such, I apprehend, is the doctrine laid down by Erskine, more largely expounded by Bankton, and supported by the general tenor of the decisions of the Court."[3] It is indeed evident that if a gift is made in contemplation of death, and is intended to have effect as a legacy, which is the ordinary condition of a *donatio mortis causa*, the granter's power of revocation must be reserved to meet the case of his possible recovery or change of intention,[4] and also that the gift must be subject to the rule that a gift *intuitu mortis* lapses by the predecease of the legatee.[5] As to the manner of constituting the donation, the property must be immediately transferred to the grantee, either by delivery of the subject in the case of corporeal moveables,[6] or by some form of constructive delivery, such as the

Intention and transfer of possession.

[1] It is not meant that a gift to a donee as trustee for testamentary purposes would be efficacious. The contrary was expressly found in *Thomson* v. *Dunlop*, 1884, 11 R. 453. A case of special conditions occurred in *Fyfe* v. *Kedslie*, 1847, 9 D. 853.

[2] *Morris* v. *Riddick*, 1867, 5 M. 1036.

[3] 5 M. 1041.

[4] The cases of actual revocation are Sp. Ca. *Wright's Trs.*, 1870, 8 M. 708, and *Macfarquhar* v. *Mackay*, 1869, 7 M. 766. In the last-mentioned case the donee was allowed credit for advances made, and all expenses incurred on the faith of the gift continuing unrevoked.

[5] On the second point see *Miller* v. *Milne's Trs.*, 1859, 21 D. 388; *Irvine* v. *Skeen*, *supra*.

[6] See a case of gift *mortis causa* of £3600 in bank notes; *Robertson* v. *Taylor*, 1868, 6 R. 917.

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transfer of an account in the books of the debtor or the delivery of the document of debt, which we have seen is the most usual case, the exception being the case where the donee already has possession of the subject.[1] A mere declaration of intention, without a transfer of possession or of the title to demand possession from the debtor or custodier of the subject, would seem to be no better than a nuncupative will, which the law, for sufficient reasons, has refused to recognise.[2] On this point only the law of Scotland, agreeing in principle with that of England, differs from the Roman law, which did not require tradition as a necessary condition of a valid gift.[3] And so, where in the case of bank money the name of the donee is not inserted in the body of the receipt, and indorsation is necessary as a title to receive the contents, the delivery of the banker's receipt without indorsation will not amount to a donation:—"In order to make a gift *inter vivos* or *mortis causa* the donor must divest himself of and invest the donee with the subject of the gift. . . . Taking the case of donation *inter vivos*, if anything remains to be done in this way, then there is no gift, for no Court will interfere to compel to be done that which remains *ex hypothesi* to be done."[4]

Whether it is necessary that gift should be made under apprehension of death.

789. There remains for consideration the question whether it is necessary to the validity of a *mortis causa* donation that the alleged gift be proved to have been made under an immediate apprehension of death. On this subject there has not been entire unanimity on the part of the Judges who considered it. The affirmative was assumed by Lord Deas in *Morris* v. *Riddick*, and maintained by Lords Young and Craighill in *Milne* v. *Grant's Executors*,[5] but in neither of these cases was the opinion expressed necessary to the decision of the case. In *Blyth* v. *Curle*,[6] where the question was directly raised, it was answered in the negative,

[1] *Gibson* v. *Hutchison*, 1872, 10 M. 923; *Blyth* v. *Curle*, 1885, 12 R. 674; a case of a gift by husband to wife of money deposited in their joint names in a savings bank. The objection founded on the absence of any form of delivery, said Lord President Inglis, "could not be sustained without deciding in effect that money lodged in a savings bank could not form the subject of a gift *mortis causa*, unless the money were actually uplifted by the donor and delivered to the donee *de manu in manum*. But in such cases proof of actual delivery is not required."

[2] The subject of delivery, as a necessary requirement, is considered more fully in the previous section.

[3] See Inst. lib. 2, tit. 7, where it is in substance stated that a gift made upon condition that if the donor dies the donee shall possess it absolutely, is effectual *in the same manner* as a legacy: "Mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam heredem suum," § 1. In the law of England, donations *mortis causa* are constituted by delivery, subject to the following rules, namely—(1) that the gift must be in contemplation of death; (2) that it is given under the implied condition that it is to take effect only in the event of the death of the donor; and (3) that there is tradition of the subject to the donee for his own use.

[4] Per Lord Young in *M'Nicol* v. *M'Dougall*, 1889, 17 R. 28.

[5] 11 R. 887.

[6] *Blyth* v. *Curle*, 1885, 12 R. 674.

the judgment being unanimous. The late Lord President in this case made an exhaustive examination of all the sources of authority in the Roman law and the law of Scotland. He showed (1) that in the Roman law three species of donation were recognised, and that in this system a *donatio mortis causa* might be made either by a person influenced by no present apprehension of danger, or by one *imminente periculo commotus;* and (2) that there is an assemblage of decided cases, beginning with *Irvine* v. *Skeen* in 1707,[1] and coming down to the very recent case of the *Lord Advocate* v. *Galloway*,[2] in which conditional donations had been proved, although at the time of making the gift the donor was in good health and actively engaged in business. The result, he says, is that "I cannot find in any of our authorities, with the exception of the *dicta* relied on by the appellants, a recognition of the necessity of a present imminent period to life as a condition of the right or power to make a condition *mortis causa*. To avoid misapprehension, however, I must here observe that the state of the donor's health, his prospect of life, and above all his own feelings and belief on this matter, are relevant and important considerations in such a case, as bearing on the proof of the *animus donandi*, and also as tending to show whether the gift is meant to be absolute or *sub modo*. In many of the cases, therefore, these considerations are dealt with as material, for an apprehension of early or immediate death may naturally supply or suggest the motive and occasion of the gift." [3]

Mode of proof and nature of defence.

790. When a claim is made against executors upon the title of donation, the question of absolute or conditional gift ceases to be of practical consequence as regards the interest of the alleged beneficiary. But as the distinction would have been of vital importance to the donor in the possible case of his recovery or of his survivance of the donee, it is necessary that the donee, in seeking to displace the presumption against donation, should be able to give a clear and consistent account of the circumstances in which the gift was made, the apparent motive or cause of granting, and the expressions used, as denoting an unconditional transfer, or a gift *mortis causa*. These are of course all relevant topics of cross-examination, and the inability of the donee and his compurgators to meet the difficulties which usually embarrass the attempt to establish a fictitious case of donation, constitutes the best security to the heirs against the success of unconscientious claims of this description.

[1] M. 6350.

[2] *Lord Adv.* v. *Galloway*, 1884, 11 R. 541.

[3] 12 R. 680.

PART V.

HERITABLE SUCCESSION AND DESTINATIONS TO HEIRS.

CHAPTER XXIV.

OF SUBSTITUTIONS, AND THE CONSTRUCTION OF HERITABLE DESTINATIONS.

1. Introductory.
2. Technical meaning of Words descriptive of Heirs, &c.
3. Words of Destination controlled by the Context.
4. Heir-Substitute, whether taking as Disponee or as Heir of Provision.

SECTION I.

Introductory.

How a settlement with substitutions is constituted.

791. The most usual mode of constituting a testamentary settlement of land is by a direct disposition to the person to whom the estate is to be granted, with substitutions to heirs, in the order in which they are intended to take. The same object may be accomplished by embodying the destination in a charter from the superior or new investiture. In the case of settlements of mixed heritable and moveable estate it is not unusual to include the whole in one disposition to trustees, who are directed to execute a conveyance of the heritable estate, or of the residue after fulfilment of the primary purposes of the trust, in favour of the heir or heirs pointed out by the settlement.[1]

General and special settlement—Disposition and procuratory—Deeds of alteration and nominations of heirs.

792. Settlements of heritable estate are either general or special, and under the feudal law were sometimes made in the form of a procuratory of resignation.[2] It was sufficient that the estate should be once for all conveyed away by a disposition; and it was not

[1] See Chapter LVI. (Trusts for the Execution of Entails).

[2] With reference to the validity of settlements in this form, when granted by a proprietor uninfeft, see *Renton* v. *Anstruther*, 16 Sh. 184, opinions on remit from H.L. 22 July 1842, 6 D. 230; affirmed 18 Aug. 1843, 2 Bell, 214. See also Stair, 3, 2, 8; 2 Ross' Lectures, 270.

necessary, either in the exercise of the ordinary power of alteration, or under a reserved power to nominate heirs, that a deed of alteration of the succession should be expressed in dispositive language.[1] But if the granter of the deed of alteration should begin by destroying the disposition contained in the original settlement, a new dispositive grant to support the destination was necessary under the feudal law.[2] In the construction of an ordinary destination to heirs, dispositive words are held to be applied provisionally to the whole of the heirs-substitute, including those who may come in under clauses of devolution or powers of appointment; and it is therefore unnecessary to repeat the words of disposition in subsequent clauses or deeds of appointment.[3] Clauses of devolution usually declare that in the event specified the estate shall "fall and devolve" to the persons named or designed. Nominations of heirs are made by the use of the words "nominate and appoint."

Effect of revocation of deed of heritable destination.

793. The right of the heir-at-law can only be excluded by substituting another person in his place, mere words of disinherison being of no effect.[4] A settlor may, however, disinherit his testamentary heirs by revoking the provisions in their favour, the effect of which is to revive the right of the heirs under a prior destination, if there be one,[5] or of the heir-at-law, if there is no prior settlement.

Substitutions either nominal or to heirs of person nominated.

794. A testamentary disposition to an individual, as institute, without mention of his heirs, vests the fee in the disponee, if he survive the settlor. A substitution to an individual, without mention of his heirs, is effectual if the substitute survive the granter and the heir previously named. To prevent the lapsing of the succession by the predecease of the institute, it is usual to insert a destination to the heirs of the body or other heirs of the disponee, even where the maker of the settlement is indifferent as to the regulation of the succession.

Destinations of heritable estate imply both substitution and conditional institution; of moveable estate, the latter only.

795. The effect of a destination in the ordinary form to persons in succession is different according as the subject of the conveyance is heritable or moveable estate. A destination of heritable estate to a plurality of persons in succession imports a substitution of each of the persons named or designed to those to whom a prior interest is given, and in whom the estate may vest.[6] A substitution,

[1] See Chapter XXI. (Revocation).

[2] But the revocation of the appointment of trustees does not import the destruction of the conveyance; *Kidd* v. *Kidd*, 9 June 1843, 5 D. 1187; *Edinr. Royal Infirmary* v. *Lord Advocate*, 28 June 1861, 23 D. 1213.

[3] Bell's Pr. § 1093.

[4] *Ross* v. *Ross*, 1770, M. 5019; *Stoddart* v. *Thomson*, 1734, Elch. "Succession," No. 1; *Blackwood* v. *Dykes*, 26 Feb. 1833, 11 Sh. 443.

[5] See Chapter XXI. (Revocation). Such revival, however, is not effectual to exclude the heir, if the second revocation be subject to reduction on the head of deathbed; *Ker* v. *Erskine*, 16 Jan. 1851, 13 D. 492.

[6] Ersk. 3, 8, 44; Bell's Pr. § 1693. In heritable destinations the presumption is

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moreover, includes a conditional institution in the same character in the event of the substitutes previously named and designed predeceasing the settlor.[1] In the case of legacies[2] and dispositions of mixed succession,[3] a similar nomination of persons in succession imports in general only a conditional institution, that is, a gift to the substituted legatees contingent on the event of the death of those previously named before the succession accrues. To raise such a destination to a substitution it must be clearly expressed that the legatees are intended to take the property in succession to one another. And, conversely, a destination of heritable estate will not be restricted in construction to a conditional institution except on clear evidence of intention that it should be so restricted.[4] In this chapter, the destinations considered are proper heritable destinations to a series of heirs and *nominatim* substitutes in succession. The construction of destinations to children and to persons taking concurrently or by way of survivorship is considered in subsequent chapters.

Force and effect of words of substitution:—"And"—"and to"—"whom failing."

796. Substitution in heritable destinations is indicated by the words "and," "and to," "whom failing, to." The alternation of these connecting words serves to mark the transition from the subordinate to the principal branches of the destination, or the converse, in a manner sufficient for the expression of the most complicated destinations. Contingent destinations, interrupting the regular course of the succession, must be introduced separately, by appropriate clauses of devolution, specifying the events in which they are to take effect. The proper use of the word "and" in contradistinction to "whom failing" is a matter of some importance; "and" being properly used only to connect a destination to heirs with the name of the individual from whom the succession is to be traced,[5] not to introduce a distinct nomination or line of heirs.[6] The recurrence of the word "and" indicates a distributive destination, as in the form "To A. B. AND his heirs-male, AND TO THE heirs whatsoever of the said heirs-male," where the heirs named in

always in favour of substitution; per Lord Pr. Inglis in *Watson* v. *Giffen*, 1884, 11 R. pp. 450-1.

[1] See on this point the cases of *Colquhoun* and *Fogo*, *infra*, Section III., and *Grant's Trs.* v. *Grant*, 2 July 1862, 24 D. 1211.

[2] *Christie* v. *Christie*, 1681, M. 8197; *Campbell* v. *Campbell*, 1740, M. 14,855; *Brown* v. *Coventry*, 1792, M. 14,863.

[3] *Greig* v. *Johnston*, 9 Sh. 806; affirmed 1 July 1833, 6 W. & S. 406; *Allan* v. *Fleming*, 20 June 1845, 7 D. 908; *Henderson* v. *Hamilton*, 29 Jan. 1858, 20 D. 473.

[4] See cases cited in last note.

[5] *Grant* v. *Gunn's Trs.*, 28 Feb. 1833, 11 Sh. 484.

[6] A destination to the granter himself *and* certain individuals named was notwithstanding held to import a substitution in favour of those named after the granter, the word "and" being read as "whom failing;" *Young's Trs.* v. *Young*, 19 July 1867, 5 Macph. 1101.

the second clause are held to be substituted to each individual heir-male as the succession opens to him.[1]

Distinction between proper destinations and designative grants to heirs.

797. In the construction of settlements of heritable estate, such words as heir, heir-male, heir of the body, &c., are considered to be proper terms of destination when preceded by the words, "whom failing" or "and,"—*e.g.*, to A. B. *and* his heirs-male. It is true that under such grants the person who is heir in the character described may succeed as institute by the predecease of the ancestor named; but even in this case he succeeds by virtue of a proper destination, the succession being computed in precisely the same way as if A. B., the institute, had succeeded, and had transmitted the estate to his nearest heir-male as heir of provision. The distinction in regard to succession between the position of an heir or conditional institute under a destination, and that of an heir succeeding as *persona designata*, are very important. In the former case the destination is not exhausted by the service of the conditional institute, but continues to regulate the succession as long as there exist heirs of the specified class capable of inheriting, or until the destination be legally altered. In the case of an heir of the same class taking under a designative grant, the purpose of the grant is fully satisfied by his succession, and there is no room for service of any other heir of the same class as heir of provision.[2]

SECTION II.

Technical Meaning of Words descriptive of Heirs, and their Place in a Destination.

Heritable destination must consist of a selection of a class of heirs comprised in the legal order of succession.

798. As preliminary to the discussion of particular destinations, the question naturally arises, What are the limits, if any, within which the principle of selection of heirs is confined? in other words, What is the general character of a tailzied destination according to the law of Scotland?[3] This subject is considered in the first chapter of the series relating to Entails.[4] The results may be summarised in two propositions:—*First*, a grant to a description of

[1] *Lockhart* v. *Macdonald*, 15 Sh. 376; on remit from H.L. 24 Jan. 1840, 2 D. 377; affirmed 15 March 1842, 1 Bell, 202; *Johnstone* v. *Johnstone*, 19 Nov. 1829, 2 D. 73; *Earl of Eglinton* v. *Montgomerie*, 22 Jan. 1842, 4 D. 425.

[2] The construction of the term "heir," when used designatively, whether in relation to moveable or to general succession, is discussed *infra*, Chapter XLII.

[3] The expression "tailzied destination" has no necessary connection with the condition of the estate as affected by the Statutes regulating entails, but denotes merely a destination to a succession of persons different from the legal order of succession. In this sense it is synonymous with heritable destination.

[4] See Chapter XXVI., Section II.

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persons can only receive effect as an heritable or tailzied destination when it is limited to individuals named, and the heirs of individuals named, selected from the class of heirs who would succeed by operation of law to the individual disponees. This definition excludes from the category of heritable destinations grants to heirs in a line of descent distinct from that of the legal order of succession, *e.g.*, to heirs in the maternal line. A grant to heirs in the maternal line can only receive effect as a *designatio personarum* in favour of the first taker and his heirs whomsoever. The selection must be based on the consideration of blood or relationship; and an exclusion of the heir succeeding to a particular estate, coupled with a consequent devolution of the succession to heirs of the next or of some other branch of the succession, will receive effect as a condition of the grant.[1]

Heritable destination cannot be constituted in favour of heirs-general in the legal order of succession.

799. *Secondly*, a tailzied destination cannot be constituted in favour of the heirs of the legal order of succession; whence we deduce this rule of construction, that a destination to a person named and his heirs (not limited to a selected class) in a grant of heritable estate intended to take immediate effect, denotes a fee-simple estate in the ancestor.

We pass to the consideration of the meaning of the terms used for the purpose of limiting a succession to particular classes of heirs:—

"Heir," how construed when used referentially in a destination.

800. "Heirs,"—"Heirs whatsoever." Although a continuing destination cannot be created in favour of such heirs, the expressions "heirs" and "heirs whatsoever" are frequently and properly introduced into limited destinations in connection with other terms descriptive of the course of descent. Thus, where the general course of the succession is based on the principle of preference for heirs-male, the word "heirs," occurring in a subordinate branch of the destination, when coupled with words of reference, designates the heirs of the selected and specified class, *i.e.*, heirs-male, or as the case may be. And therefore, where heirs-general are intended to take after heirs-male, the distinctive word "whatsoever" is used to mark the transition, and to prevent ambiguity. This effect of the word "whatsoever" is seen in the common destination of entails to A. B., and the *heirs-male* of his body, and the *heirs whatsoever* of the body of the said heirs-male.

Destination-over to heirs-general on failure of specified line, effectual as a substitution until altered.

801. A gift over at the end of a destination to heirs whatsoever, whether of the granter or of some person other than the last substitute, will be effectual as a substitution according to its tenor;

[1] See *M'Gillivray* v. *Soutar*, 12 March 1862, 24 D. 759, where it was held that a restriction to heirs-male of a particular clan was not a recognisable limitation of the destination.

but in this case the grantee of the destination-over takes as under a designative appointment to himself, and not as a member of a proper destination.[1] It is scarcely necessary to add that the term heirs whatsoever, whether used absolutely or coupled with limiting words, includes heirs-portioners. The decisions on this point will be noticed in a subsequent chapter.[2]

Destination to heirs-general, whether operative in favour of heir of line or heir of conquest.

802. Whether, under a destination to heirs whatsoever, the succession devolves to the heir of line or to the heir of conquest, depends on the consideration whether the heir takes by operation of law after the ancestor, or designatively under the destination. In the former case,—*e.g.*, under a destination to A. B. and his heirs whatsoever, where the succession has already vested in A. B. and opens to his heirs after his death, the question is ruled by the law of intestate succession. If A. B. is heir *alioqui successurus* of the granter or of the heir-substitute to whom he succeeds, as the case may be, the succession will clearly devolve to his heir of line; but if he is not the heir, then it will fall to his heir of conquest.[3] In the case of heirs whatsoever called designatively, three cases may be distinguished. And *first*, where a succession opens to the heir whatsoever of a *nominatim* disponee in the character of a *conditional institute*, then, inasmuch as no estate ever vested in the disponee, the estate cannot in any view be regarded as conquest of him. The expression "heir whatsoever" is therefore construed designatively, and is held to denote the heir of line, as representing the principal line of succession.[4] Next, where an entailer at the end of a destination calls either his own heirs whatsoever[5] or the heirs whatsoever of another person, to whom the estate is not previously given,[6] in either of these cases, inasmuch as the succession is not derived from the ancestor from whom the relationship is traced, the estate cannot be said to have been either heritage or conquest in his person; the destination is therefore designative, and the succession will follow the principal line of descent. "There is no case," said Lord Neaves, "in which it has been held, and no authority by which it is laid down, that an air of conquest ever succeeds *designativé* under the general terms 'heirs' or 'heirs whatsoever,' where the succession in dispute is to a third party, and

[1] *Robison* v. *Robison*, 3 June 1859, 21 D. 905; but see *contra*, *Henry* v. *Watt*, 13 June 1832, 10 Sh. 644.

[2] Chapter XXVI., Section II. (Tailzied Destinations).

[3] *Short* v. *Short*, 1771, M. 5615; 19 March 1799, 2 Pat. 495; and see *Brown* v. *Campbell*, 16 March 1855, 17 D. 759; and Chapter IV., Section II. (Intestate Succession).

[4] *Miller* v. *Miller*, 19 Jan. 1831, 9 Sh. 295; 27 Aug. 1883, 7 W. & S. 1.

[5] *Robison* v. *Robison*, 3 June 1859, 21 D. 905.

[6] *Boyd* v. *Boyd*, 1774, M. 3070; and see the analysis of this case in Lord Neaves' judgment in *Robison* v. *Robison*, 21 D. 910.

not to his own ancestor. It would be difficult of course to deny that an heir of conquest may be so clearly designated as to give him a plain right, as where he is expressly called by that very designation. But where he is not so called, and the words used are 'heirs whatsoever,' it does not appear that an heir of conquest has ever been held to be thus designated so as to succeed as heir of provision to a third party who is the disponee."[1] Lastly, where, in the case supposed, of the granter's heirs whatsoever being called at the end of the destination, if those heirs should succeed as conditional institutes in consequence of the failure of the disponee and heirs of provision before the succession opens, it would seem, as observed by Lord Neaves, that the heir of conquest is entitled, if the property were conquest in the person of the granter of the settlement, because in this case the heir succeeds to his own ancestor. It is right, however, to notice that this construction is open to the objection that it involves, as a necessary consequence, that in different possible events a different meaning is put upon a destination to heirs whatsoever.[2]

Meaning of the term heir of line.

803. "Heirs of line,"—"Heirs general of line." These expressions, which do not often occur in destinations, may be regarded as synonymous with "heirs whatsoever," excluding the heir of conquest. The question here suggests itself, whether a grant to a person and his heirs of line might not receive effect as a continuing destination, by construing the words in the sense that the relationship of each successor is to be traced, not from his immediate predecessor, but from the ancestor named in the deed? We do not think that the words would be so construed; and on the question of the possibility of constituting a tailzied destination in favour of a succession of heirs whose relationship is to be traced to the first taker, we refer to the opinions of the Judges in *MacGregor* v. *Gordon*.[3] A destination to an individual named includes his heirs; but an immediate substitution of one person to another excludes the heirs of the institute[4] except in gifts by parents to children.

Heirs of the body.

804. "Heirs of the body" is an expression denoting a limitation of the legal order of succession to heirs in the direct line of descent, being of the blood of the ancestor named. A destination to heirs of the body, accordingly, cannot fail so long as there is issue surviving of the ancestor.

Heirs of a marriage betwixt specified persons.

805. "Heirs of the marriage" has a more restricted signification. It includes the children of the marriage in question, and their issue in the order of legal succession.

[1] 21 D. 911.

[2] See observations in *Robison* v. *Robison*, 21 D. 909, 912-15.

[3] *MacGregor* v. *Gordon*, 1 Dec. 1864, 3 Macph. 148.

[4] *Forsyth* v. *Fergusson*, 14 June 1832, 10 Sh. 646. See Chapter XXXIX. (Implied Institution of Children).

Heir-male general of provision.

806. "Heirs-male" limits the succession to male heirs, whether in the direct or the collateral line, who are connected with the ancestor solely by males. It excludes female heirs and male heirs connected in descent by females. In *Sinclair* v. *Earl of Fife*,[1] the destination was "to the nearest lawful heir-male of line whatsoever;" and it was contended that the expression was contradictory, inasmuch as heir-male and heir of line denote different orders of succession; but it was held that the destination might receive effect as a grant in favour of the heir-male general excluding the heir of conquest.[2]

Heir-female general of provision.

807. "Heirs-female" denotes the heirs-general of the ancestor or person named, excluding his heirs-male.[3] In practice heirs-female are usually substituted to heirs-male, as thus: to A. B. and his heirs-male, whom failing, to his heirs-female; and, the male line being extinct before the destination to heirs-female comes into operation, the persons who succeed under the last-mentioned destination are the surviving heirs-general of the ancestor. Again, as the substitution is to the heirs-female of A. B., and not the heirs-female of the last heir-male, it follows that, on the failure of the male line, the heir-general of A. B. (although wholly unconnected in relationship with the last heir-male) is entitled to take up the succession. Both these points were determined in the *Bargany* case.

Mode of tracing the descent under such destinations.

808. John Lord Bargany disponed his estates to the heirs-male of the body of his eldest son, the Master of Bargany; whom failing, to his second son, and the heirs-male of his body; whom failing, to the eldest heir-female of the body of Lord Bargany, the entailer, and the descendants of her body, without division; whom failing, to the next heir-female to be procreated of the body of the said Lord Bargany, and the descendants of the body of the said next heir-female. On the failure of the heirs-male of the destination, three persons claimed the succession:—1*st*, Hugh Dalrymple, the nearest heir-general of Lord Bargany, being a descendant of his eldest son; 2*d*, Sir Alexander Hope, the son of Lord Bargany's daughter; and 3*d*, Mary Buchan, granddaughter of Lord Bargany's

[1] *Sinclair* v. *Earl of Fife*, 1766, M. 14,944; affirmed 5 April 1767.

[2] Under a destination to the "heirs whatsoever" of A., the heir of line always succeeded in preference to the heir of conquest. See the authorities cited in *Mackintosh* v. *Ross*, 1873, 11 M. 636.

[3] Erskine's definition of heirs-female (Inst. 3, 8, 48) as "heirs-at-law after the failure of the lineal male issue," is open to exception, on account of the ambiguity of the word "lineal," which in one sense would imply that heirs-male of the body only are excluded. It was assumed in the judgment in the *Roxburghe* case, and is now the undoubted law, that a destination to heirs-female on the failure of heirs-male does not come into operation until after the failure of the heirs-male general, that is, of the collateral as well as the descending line.

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second son, who was the last heir in possession. The Court had no difficulty in repelling the claim of Mary Buchan, which could only be supported on the theory that the succession was to be traced from the heir last succeeding under the destination. But, on an erroneous construction of the phrase "heir-female of the body" (which was held to be synonymous with daughter), judgment was given in favour of Sir Alexander Hope, a descendant of the entailer's daughter. The decision was reversed in the House of Lords, and judgment was given in favour of Sir Hugh Dalrymple, the entailer's nearest heir-general.[1]

Eldest daughter or heir-female.

809. In the case of *Kinfauns*,[2] the destination, on failure of the male line, was "to the eldest *daughter* or *heir-female*" of a certain marriage; and the question was, which of these words was to be controlled in construction by the other. The estate was claimed by the descendant of a son, as nearest heir-female; and by a daughter of the marriage, as a person designated in the grant. The decision was in favour of the heir-female; and, from Mr. Sandford's narrative of the case, it would appear to have been based on the assumption that "daughter" was a term of flexible construction, while "heir-female" had a technical and fixed signification; whence it followed that the former must yield to the latter. The word "daughter" is doubtless susceptible of construction when the context shows that it is used in a peculiar sense; but can it be truly characterised as a *flexible term?* We think not.[3] A better reason for the decision may, we apprehend, be found in the consideration that the word "daughter," being properly designative of an individual, is not a *word of destination;* and that, as the ambiguity occurred in a clause of destination, the term "heir-female," which denotes a succession of persons, and is therefore appropriate to the purpose of a destination, is to be regarded as the governing expression; "daughter" being introduced in conjunction with it merely as an illustration of the female line of succession. In construing the words "heir-male," "heir-female," &c., in clauses bearing reference to the destination, those persons are to be understood who are called in the character designated, and not the

[1] *Dalrymple* v. *Hope and Buchan*, 27 March 1739, 1 Cr. St. & P. 237, and Elch. "Provisions to Heirs," No. 2. *Johnstone* v. *Johnstone*, 19 Nov. 1839, 2 D. 73.

[2] *Blair* v. *Lyon*, 1739, 5 Br. Sup. 663; and see the fuller narrative of Mr. Sandford, taken from Lord Elchies' papers (Tr. on Entails, p. 64). See also the same author's criticism (p. 65) on Lord Kilkerran's observations on this case in *Ewing* v. *Miller*, 1747, M. 2308.

[3] The case of *Lady Essex Ker* v. *Innes*, 13 Nov. 1810, F.C., and 26 Feb. 1812, 5 Pat. 579, is a clear authority, if authority were needed, for the proposition that the word "daughter" is not a term of flexible meaning, in the sense of being subject to construction according to the probable intention.

persons who stand in the relation of "heirs-male," or "heirs-female" to the granter of the deed.[1]

Heir-male of the body.

810. "Heirs-male (or female) of the body." Under these destinations, the succession in the male or female line, as the case may be, is confined to heirs who are in the direct line of descent, and the blood of the ancestor.

Distributive destinations, how construed.

811. "To A. B. and the heirs-male of his body, and the heirs whatsoever of the bodies of the said heirs-male." Under this destination, the gift to heirs whatsoever of the bodies of the heirs-male is construed distributively, so that the heirs-general of the body of the first heir-male to whom the succession opens take precedence of the second and remoter heirs-male of the body of the *nominatim* disponee. On the failure of the issue of the first heir-male, the succession devolves to the next heir-male of the disponee or ancestor named,[2] and the heirs-general of his body; and so on, according to the law of the destination. The construction of this destination was so determined by the judgment of the House of Lords, affirming that of the whole Court, in the case of *Lockhart* v. *Macdonald*.[3] The competition was between the daughters of a senior heir-male and the junior heir-male next in succession; the daughters claiming as heirs whatsoever of the body of the heir-male who took first; and the heir-male insisting that all heirs-male of the body of the ancestor must be exhausted before any of his heirs-general could be let in. The judgment was in favour of the daughter; and, notwithstanding the ability displayed in the adverse opinion of Lord Meadowbank,[4] the principle of the judgment—the principle, namely, of distributive construction—commends itself as that which is most consonant to the natural and grammatical meaning of the words of the destination.

Fettercairn and *Arbuthnott* cases.

812. "To the heirs-male procreated of the marriage between A. and B. (the entailer's daughter), and the heirs-male of their

[1] *Forbes* v. *Skene*, 25 Jan. 1757, 1 Cr. St. & P. 628.

[2] "If," said Lord Cottenham, in the case of *Lockhart*, "the consequence of holding that the eldest son took, with remainders upon his death to his daughters if he had no son, would be that, upon the failure of the line of such daughters, the estate would never return to the younger sons or their issue, I should feel the greatest difficulty in adopting a construction which would lead to such a result; but I have come to the conclusion that such would not be the consequence of the construction adopted by the majority of the judges;" 1 Bell, 214.

[3] *Lockhart* v. *Macdonald*, 19 Jan. 1837, 15 Sh. 376; on remit from H. L. 24 Jan. 1840, 2 D. 377; judgment affirmed 15 March 1842, 1 Bell, 202.

[4] 2 D. 390. A narrative of the unreported cases of *Rothes* and the *Polwarth Peerage*, so much canvassed in the opinions of the leading case, will be found in Sandford on Entails, pp. 98-100. These cases do not throw much light on the question; for the specialty of the destination in *Lockhart's* case—viz., the substitution to heirs "*of the bodies of the said heirs-male*"—was wanting in the first-mentioned cases.

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bodies respectively, whom failing, to the heirs whatsoever of the bodies of such heirs-male respectively." Such was the destination in the deed of entail of Sir John Stuart of Fettercairn,[1] and, according to the concurring judgments of the Court of Session and the House of Lords, the first member of the destination is equivalent to "sons of the marriage of A. and B." in their order, so that on the death of the eldest son without male issue the succession opened to his daughter as heir whatsoever of his body, in preference to the next heir-male of the marriage. This construction seems reasonably clear on the grounds stated by Lord Selborne, which were chiefly these (1) that the words "procreated of the marriage" in their strict and accurate signification are certainly more appropriate to issue of the first generation than to any afterwards who are truly and literally procreated of other persons, though their immediate parents may be traced back to the persons named; and (2) that the alternative construction would be identical in effect with a destination to the heirs-male of the body of A. by his marriage with the entailer's daughter, whom failing, to his heirs-female by the same marriage, and to accomplish this effect it was unnecessary to use the very special language of the actual destination. An artificial principle of construction was again applied in the *Arbuthnott* case,[2] decided while the last-cited case was under appeal. Here, the existing sons (other than the eldest) of the entailer's eldest son, John, were nominated successively, the destination being to each son and the heirs-male of his body (subject to exceptions). The final destination was "to the other heirs-male of the body" of the truster's eldest son, John (subject to the same exceptions). It was held that the words quoted meant *younger sons nascituri* of John and their respective heirs-male, and did not mean the heir-male of the body of John descended from John's eldest son. It must be admitted that this decision is open to criticism; and that no reason can be given for excluding the elder branch in a case like this, except that its admission is inconsistent with the general plan of the destination, a reason which, with all respect to the eminent Judges who considered the case, may justly be considered insufficient to warrant a deviation from the legal construction of the words used.

Distributive destinations: other examples.

813. "To the heirs-female of the body of A. B., and the heirs-male of the body of the eldest heir-female" (or "of the said heirs-female *successivé*"). The destinations here quoted occurred (with immaterial variations in phraseology) in the cases of *Johnstone* v. *Johnstone*,[3] and the *Earl of Eglinton* v. *Montgomerie*.[4] They are

[1] *Forbes* v. *Trefusis*, 1873, 11 M. (H.L.) 44.

[2] *Arbuthnott* v. *Arbuthnott*, 1869, 7 M. 371.

[3] *Johnstone* v. *Johnstone*, 19 Nov. 1839, 2 D. 73.

[4] *Earl of Eglinton* v. *Montgomerie*, 22 Jan. 1812, 4 D. 425.

distributive destinations; and are in no way distinguishable from that in *Lockhart's* case, excepting that the positions of the heirs-male and female in the destination are reversed. In the first-mentioned case, Mr. Hope Johnstone, whose title was sustained by the Court, was the next surviving heir-female after failure of the male issue of the first heir-female. Applying, then, the rule of distributive construction, the succession properly reverted to him at the transition to the female line consequent on the failure of the sub-destination to the heirs-male of the eldest heir-female. The pedigree quoted in the report shows that the actual course of descent, antecedent to the action, had been conformable to this construction of the destination.

Distinction between "and" and "whom failing" in distributive destinations.

814. "To A. B. and his heirs-male; *whom failing*, to *their* heirs-female." The difference between this and the destination in the case of *Lockhart* consists in the employment of the words "*whom failing*" in place of "*and;*" words which are obviously inconsistent with the notion of a distributive succession. It would seem, therefore, that under this destination the heirs-female do not take until after the failure of all the heirs-male of the *nominatim* disponee. But does the succession then devolve to the heir-general of the *last heir-male*, or to the heir-general of the *first heir-male*, *e.g.*, supposing both these heirs have had daughters who have left issue surviving? Mr. Sandford's opinion, which is given with some hesitation, is in favour of the representative of the *first* heir-male.[1] But this construction seems open to criticism on this ground, that the daughter of the first heir-male and her representatives are also heirs-female of the ancestor A. B.; and if the estate had been intended to go to them, the destination would naturally have been conceived in favour of A. B. and his heirs-male, whom failing, to *his* heirs-female. But by the use of the expression "*their* heirs-female," the entailer must be supposed to have intended a different destination from the ordinary one to the ancestor and *his* heirs-female. The difference is this, that the word "their," in the destination, is wholly indeterminate in the mind of the settlor, though it may become determinate by the occurrence of the event which is to fix its meaning and application. If this reasoning is correct, the word "their," in the destination supposed, will apply to the heir-male whose failure causes the succession to pass into the female line.

"Son," "daughter," when construed as referential words signifying heir.

815. "Son,"—"Daughter." It has sometimes been attempted to affix to one or other of these words a signification indicative of a class of heirs or persons other than the immediate descendants; but in no instance has the construction contended for been admitted, except where "son" or "daughter" was, by words of refer-

[1] Sandford on Entails, p. 66.

ence, clearly identified with some other and governing word of destination. The case of *Kinfauns*,[1] formerly noticed, where "daughter" was held to be governed by "heir-female," exemplifies the exception. The leading authority for the general rule of construction, is that of the *Lady Essex Ker* v. *Innes*,[2] one of the cases arising out of the disputed *Roxburghe* succession. The destination was "to the eldest dochter of the said Hary Lord Ker *without division*, and yr airis-male." It had previously been fixed, in the competition between General Ker and the defender, that "eldest" daughter meant eldest at the time the succession might devolve; that is, daughters in the order of seniority. Lady Essex Ker was the nearest heir-female of Lord Harry Ker's eldest daughter (the male line being extinct), and therefore the heir-general of the family of Roxburghe. Founding upon the decision in the previous competition, as an authority for the flexible construction of the word "daughter," she maintained, on considerations based partly on the context of the settlement, partly on the improbability of the entailer passing over the female representatives of the elder daughter in favour of the younger, that the word daughter ought to receive a still more extended signification, and to be construed in the sense of "heirs-female." The introduction of the words "without division," which, whether applied to the individual daughters *seriatim* or to their heirs-male, were alike unnecessary and unmeaning, certainly argued an intention or understanding on the part of the entailer that heirs-female should take. But that intention, if it existed, was not carried into execution; there was no express destination to heirs-female, and the Judges of the Court of Session and of Appeal were unanimously of opinion that no such destination could be held to be implied under a conveyance to *daughters* and their heirs-male.[3]

816. So also in the case of the *Marquis of Hastings* v. *Hastings*,[4] where an entailer provided that, in the event of there being only *one son* of a certain marriage, who should succeed to the honours and estate of Loudon, then the second son of this only son should succeed to the estate of Rowallan; and made a similar

[1] *Blair* v. *Lyon*, 1739, 5 Br. Sup. 663, *supra*, § 1153.

[2] *Lady Essex Ker* v. *Innes*, 13 Nov. 1810, F.C.; 26 Feb. 1812, 5 Pat. 579.

[3] "Daughter," said Lord President Blair, "is not a technical word, having a particular meaning affixed to it by the law. It is a word of common popular language; and when it occurs in a law book or a deed has just the same meaning as in a book, a letter, or in common conversation. As to the established use of the word in common language, argument is to little purpose; it must be determined by the popular use of the language, of which every person can judge as well as the most profound lawyer, 5 Pat. 586.

[4] *M. of Hastings* v. *Hastings*, 12 Nov. 1844, 7 D. 1. This ground of decision is not alluded to in the judgment on appeal, 6 Bell, 30.

provision, in case of there being *two sons* of the marriage, in favour of the second son, adding, "that the succession to the estate of Rowallan, in case *any of the heirs of this marriage* shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming,"—it was held that by the reference to heirs of the marriage in the concluding phrase, the clause of devolution relating to the succession of sons was not extended and made applicable to the case of any other heir of the marriage who might succeed to the honours and estate of Loudoun.[1]

Effect of the rule that, under destination to heirs of the body, the descent must be traced from the person designated.

817. In tracing the descent of heirs of provision, it is necessary to attend to the peculiar limitation of the line of direct descent implied in the words "of the body." These words clearly limit the succession to heirs of the blood of the ancestor; and therefore, where, in consequence of the failure of the issue of a son of a female heir, it is necessary to resort to collaterals, the heir of the body must be sought among the collaterals of the heiress or her ancestors, and not, as in ordinary succession, among the husband's relatives. In the case of tailzied succession under a limitation to heirs of the body, the rule *paterna paternis, materna maternis,* is therefore strictly applicable. Whether the same rule of descent holds good under destinations to heirs-female general is a more doubtful question. It was indeed laid down in a modern case[2] by one of the Judges, as an unquestionable proposition, that in every case of service as heir of provision the line of descent is to be traced from the *stirps* or ancestor named in the deed, and never from the heir to whom the service is obtained. To this doctrine—which implies not only the preference of the maternal to the paternal line in estates descending from a female, but also the ignoring of the distinction between the full and half blood, and which, whether correct or incorrect, rests on the authority of the Judge by whom it was propounded—we are not prepared to give an unqualified assent. The cases cited in support of it[3] have no direct bearing on the matter; because in these the dispute arose upon the transition from the male to the female line, where resort must *necessarily* be had to the *stirps,* as the person from whom the descent is to be traced. But where the question is as to the person entitled to succeed *to* an heir-female general dying without issue, we certainly should not expect the heir-at-law, if descended from a sister of the full-blood, to acquiesce in the service of a brother of the

[1] *Irregular Destinations.*—In *Connell* v. *Grierson*, 14 Feb. 1867, 5 Macph. 379, an ultimate destination to the entailer's "nearest of kindred," was held to denote the heir-at-law or nearest blood relation according to the rules of heritable succession.

[2] Per Lord Curriehill in *Macgregor* v. *Gordon*, 1 Dec. 1864, 3 Macph. 148.

[3] The *Bargany* case, 1 Cr. St. & P. 237; and *Johnstone* v. *Johnstone*, 2 D. 73.

half-blood, or his representative, and still less in that of a maternal relative. In the absence of any decision bearing on the point, it must be considered an open question whether the succession of heirs-female general is to be deduced from the *nominatim* disponee or from the heir-female last seized in the estate.[1]

Effect where the same individual is called as heir of provision under distinct branches of the destination.

818. From the number and variety of destinations introduced into deeds of entail, it happens that the same person or class of persons is not infrequently called to the succession in different parts of the destination. Where this is so, the rules of construction require that effect should be given to both grants, according to the order in which the succession opens under them. This incident of destinations occasionally leads to curious and unexpected results. For example, a person comprised in a prior destination, say, in a destination "to the heirs-male of A. B.," may be excluded from the succession by a shifting clause, devolving the succession to a junior branch in the event of any of the heirs-male of A. B. succeeding to a certain title or estate; and upon the failure of the junior branch in question, the succession may again open to the same person under an ulterior destination, say to the heirs-general of C. D. In this case, it has been held that if the shifting clause did not apply to the ulterior destination, the heir, though he had renounced in the character of heir-male of the *nominatim* substitute in the primary destination, was entitled to be served as heir-general of the substitute in the ulterior destination.[2] Where the succession opens to an heir under two distinct branches of the destination at the same moment of time, and the gift under one of these branches is qualified by conditions and prohibitions which are not applied to the other branch of the destination, the heir may elect to take under the unqualified gift, although it is posterior in position to the qualified.[3] If the heir, according to the conception of the destination, is a liferenter under one clause and fiar under a later substitution, he is not disabled from taking the fee.[4]

819. It has happened, where property has been disponed to a son or daughter *de præsenti* under reservation of the granter's liferent, that on the death of the institute without issue the succession apparently opens to the granter's heirs whatsoever under the last

[1] In deducing the succession of heirs-male, the result is precisely the same, whether the descent is traced from the first ancestor or the last. The succession, being deduced wholly through males, can never pass to the maternal line, nor will it deviate to collaterals of the half-blood until after the failure of heirs of the full-blood, even where the succession is not limited to heirs of the body, and actually passes to representatives of the ascending line. This may not be obvious at first, but may be proved by tracing the succession on a table of descents.

[2] *Fullarton* v. *Hamilton*, 12 Feb. 1824, 2 Sh. 697, N.E. 586; 20 June 1825, 1 W. & S. 410.

[3] *Dalyell* v. *Dalyell*, 30 May 1809, F.C.

[4] *Mackenzie* v. *Sharpe's Trs.*, 1877, 4 R. 642.

branch of the destination. Here, if the granter has survived his child, the rule of law takes effect, that a fee cannot be *in pendente*, and as the father can have no heir in his lifetime, the destination is exhausted, and the father takes the fee as heir of his child.[1] CHAPTER XXIV.

SECTION III.

Words of Destination controlled by the Context.

820. We have now examined the meaning and effect of the technical expressions which are used to designate the various lines of descent in destinations to heirs of provision. Where destinations are expressed in technical language, and the terms of the destination are used in a manner consistent with the course of devolution under a tailzied destination, no question of construction can arise. Wherever a construction different from the technical meaning of the words has been contended for, the argument for changing the construction of the words has been founded either upon explanatory expressions in the context, or on some supposed anomaly, which would result from giving effect to the destination, according to its technical meaning. Words of destination construed according to their technical meaning when consistently used.

821. In construing the technical phraseology of destinations, it is not permissible to resort to evidence extrinsic of the deed, or even to reason from the intention supposed to be deducible from the general strain and purpose of the deed. In the construction of imperfect, elliptical, or ambiguous expressions in destinations, resort may, however, be had to implication deduced from the immediate context; and the effect of explanatory expressions, even when occurring in other parts of the deed, must be taken into view. Source of construction of imperfect destination: (1) Immediate context: (2) Explanatory provisions.

822. Our first proposition excludes from the sources of legitimate construction such indications of intention as arise either from the narrative, or from other deeds or collateral writings. As in the case of *Campbell* v. *Campbell*,[2] where the testator, for the love and favour *he bore to John Campbell, his only son, and his other children after mentioned* (and who, accordingly, are named in the deed), disponed certain urban subjects "to and in favour of the said John Campbell, his heirs-male and assignees whatsoever, whom failing, to his own other nearest heirs," under burden of certain legacies, and, *inter alia*, of a legacy of £5 to Gabriel Campbell, his nephew. John Campbell, the institute, predeceased the settlor; and the estate was claimed by the said Gabriel Campbell, as heir-male general of provision. On behalf of the daughters, it was Words of destination not controlled by the narrative or by collateral writings.

[1] *Todd* v. *Mackenzie*, 1874, 1 R. 1203. [2] *Campbell* v. *Campbell*, 1770, M. 14,949.

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contended that the express consideration of love and favour for his other children, coupled with the circumstance of the nephew being named as a legatee for a trifling sum, argued an intention to prefer the daughters to heirs-male in the collateral line; and therefore, that the destination to heirs-male ought to be limited in construction to those of the settlor's body. But these considerations were held to be insufficient to control the technical meaning of the words of the destination; and the heir-male in general was accordingly preferred. A similar decision was given in the *Linplum* case,[1] a case which has acquired great authority from the importance attached to it in the opinions of the Peers who disposed of the *Roxburghe* case.[2] Sir Robert Hay of Linplum disponed his estate to such of the younger sons of the Tweeddale family as were then in existence, *nominatim et seriatim*, and the *heirs-male of their bodies*, whom failing, to Alexander Hay and his lawful *heirs-male*, and, after some substitutions which did not take effect, to the heirs-female of the body of John Marquis of Tweeddale. It is stated in the report that, from the tenor of the deed, it appeared highly probable that the change in the form of expression from "heirs-male of their bodies" in the prior destination to "lawful heirs-male" in the subsequent destination, was not occasioned by any difference in the intention of the granter, but had crept in through the inaccuracy or want of skill of the writer of the deed, who was not a conveyancer by profession. Alexander Hay having died without issue, a competition for the estate arose between Robert Hay, his brother and heir-male general, and Miss Hay, the nearest heir-female under the ulterior destination, it being maintained on behalf of Miss Hay that the expression "lawful heirs-male" of Alexander Hay was, by the argument founded on probable intention, to be held as restricted to the heirs-male of his body. But it was found by the Court of Session that the succession must be determined according to the technical signification of the term, and this judgment was affirmed on appeal.[3]

823. So also in the case of the *Earl of Selkirk* v. *The Duke of Hamilton*,[4] where Charles Earl of Selkirk, the creditor in certain heritable bonds, had taken the destination in favour of himself, his heirs and assignees whatsoever, intending thereby to designate the heir of line, and had by his will given a *legatum liberationis* of certain of the bonds to the Duke of Hamilton, the heir of conquest, thus showing his belief that those securities would not

[1] *Hay* v. *Hay*, 1788, M. 2315; affirmed 25 May 1789, 3 Pat. 142.

[2] See Lord Eldon's observations, 5 Pat. 431 *et seq.*

[3] 3 Pat. 142.

[4] *Earl of Selkirk* v. *Duke of Hamilton*, 1740, M. 5615; Elch. "Heritage and Conquest," No. 3; 5 Br. Sup. 684; affirmed 2 April 1740, 1 Cr. St. & Pat. 271.

devolve to the Duke by force of the destination. It was held, notwithstanding, that the Duke of Hamilton, as heir of conquest, was entitled to the succession in respect of the nature of the subject.[1] The principle is further illustrated by the *Mar* succession case,[2] where an entailer, on the narrative that he had agreed to dispose the estate to certain persons, whom failing, to A. and the heirs of her body, proceeded to dispose in terms of a destination which contained a substitution to A. and the heirs-male to be procreate of her body, whom failing, to the heirs whatsoever descending of her body. It was held that the narrative must be read as setting forth the general course of the succession, and in a sense consistent with the actual destination to the descendants of A.

Extrinsic evidence of intention not admissible for controlling words of destination.

824. It is further to be understood, in conformity with the negative proposition laid down at the commencement of this discussion, that evidence of intention extrinsic to the deed, whether parole or belonging to the history of the transaction,[3] is insufficient to modify the technical meaning of words of destination.[4] Where a *nominatim* substitute is described as standing in a certain relation to the entailer or his family, his right cannot be cut down by an offer of proof on the part of another claimant that he is the person holding the specified relation, or answering to the words of description.[5] This rule was rigorously applied to a class of transactions which in former times frequently perplexed the course of family settlements. Where, under the old election law, a charter was obtained for the purpose of creating a freehold electoral qualification, the conveyancer sometimes inserted the common destination to heirs whatsoever, without any intention of thereby altering the succession, and doubtless in reliance on the doctrine, erroneously laid down by the institutional writers, that a general destination to heirs whatsoever in a deed of investiture was controlled by a destination to heirs of provision in the antecedent settlements of the estate.[6] It was,

[1] See also the cases cited upon the question, in what circumstances the words "of the body" may be implied in a destination to heirs of provision, *infra*, § 833 *et seq.*

[2] *Erskine* v. *Earl of Kellie*, 1873, 11 Macph. 876. As to discrepancy between the narrative and dispositive clauses in gifts to a class or to issue, &c., see *Chancellor* v. *Mossman*, 1872, 10 Macph. 995.

[3] But the Court may legitimately take into consideration the circumstances of the family history in reasoning from the intention apparent in the context. No better example can be found of the legitimate use of this kind of evidence in explanation of the context, than the criticism of Lord Eldon on the *Linplum* case, in delivering judgment on the *Roxburghe* case. See 5 Pat. 432 *et seq.*

[4] *Duke of Hamilton* v. *Douglas*, 1762, M. 4358. See as to competency of parole evidence, p. 4369; and, upon the same point, *Ball* v. *Coutts*, 6 March 1806, reported as a note to *Dykes* v. *Boyd*, 1813, 17 F.C. 344.

[5] *Lord Lovat* v. *Fraser*, 1884, 11 R. 1119.

[6] See Ersk. 3, 8, 47. The cases which were supposed to sanction that doctrine

however, finally determined by a series of decisions that the apparent object of the transaction was an element which the Court could not legitimately take into consideration; and consequently, that where a disponee or heir of provision obtains a charter from the superior containing a destination to himself and his heirs whatsoever, the destination must receive effect according to its technical meaning, without reference to the settlements or to the purposes for which the new investiture was required.[1] In advising the case of *Molle* v. *Riddell*, where it was argued that the title, having been obtained for a political purpose, should be held effectual for no other, it was laid down emphatically by two of the Judges that the Court would not consent to construe such deeds in a way different from other deeds, nor look to motives, but only to what had been done, and the consequences. It was observed with much force by Lord Glenlee, that when such deeds are made care was always taken that the *dominium utile* at least should not go against the inclination of the parties; that people of moderate fortunes would take this opportunity of settling their estates; or, if their minds were not made up, would at least take care that nothing was done in that respect contrary to their inclinations.[2]

"Heirs and assignees" not a flexible expression, but the destination may be subjected to a condition.

825. In another class of cases, where estate is destined to a person named and his heirs and assignees, with ulterior substitutions in favour of other heirs, the argument has been maintained, on behalf of the substituted heirs, that the gift to the heirs and assignees of the *nominatim* disponee should be limited in construction so as to import either a fee-simple in the disponee, subject to the condition of his surviving and taking an assignable interest, or an absolute fee in the same person, with a substitution in favour of the heirs of his body.[3] The argument here proceeds on the apparent absurdity of inserting destinations-over to other parties, which can never take effect in any event, if the destination to heirs and assignees is to be read as a gift of the fee to the heirs-general of the person instituted. Those cases will be examined when we come to treat of the manner in which a limitation *to heirs of the body* may be implied.[4] It may be sufficient to say here, that such a limitation will not be raised by implication under a destination

are criticised in a note to Mr. Sandford's Treatise on Entails, p. 80. Two of these, viz., *Marquis of Clydesdale* v. *Earl of Dundonald*, 1727, M. 1275, and *Skene* v. *Skene*, 1725, M. 11,354, are shown to have been misinterpreted; while the remaining case, *Weir* v. *Steele*, 1745, M. 11,359, Elch. "Presumption," No. 17, is deprived of all weight by the consideration that the Court proceeded upon a parole proof; in any case, the point was erroneously decided.

[1] *Rose* v. *Rose*, 1784, M. 14,955; *Molle* v. *Riddell*, 13 Dec. 1811, F.C.; affirmed 19 June 1816, 6 Pat. 168.

[2] 16 F.C. 439-41.

[3] *Baillie* v. *Tennant*, 1766, M. 14,941; *Murray* v. *Flint*, 1774, M. 14,952.

[4] *Infra*, § 833, *et seq.*

to an institute and his heirs, except where the subsequent destination is conditioned to take effect upon the failure of the institute *and his issue*.[1]

Words of destination, how affected by the context.

826. We pass to the consideration of the affirmative part of the proposition with which we set out, namely, that words of destination may be extended or limited in construction by the immediate context, or by subsequent explanatory provisions. The object in view can only be accomplished by a detailed examination of the cases. These we shall proceed to classify according to the rules of construction illustrated by them, beginning with those rules which are obvious and settled, and advancing to such as are either doubtful in themselves, or of uncertain application.

Dispositive clause gives the general meaning, but may be explained by other clauses.

827. And *first*, with regard to discrepancies between the terms of the destination as contained in the dispositive clause, and as repeated in the procuratory of resignation and precept of sasine. Questions of this nature are not likely to occur in the future, in consequence of the changes in the forms of conveyancing introduced by the Lands Transference Acts, but the decisions upon this class of questions are valuable illustrations of the application of the rules of construction to destinations. The leading principle is, that the destination is governed by the terms of the dispositive clause ; but that, where its terms are ambiguous or imperfect, their meaning may be explained, and the intention of the maker of the deed collected, from the phraseology of the corresponding passages of the procuratory and precept. The first branch of the rule is exemplified by the case of *Forrester* v. *Hutchison*,[2] where, by the dispositive clause of the settlement, the estate was destined to William Forrester *and the heirs-male of his body*, whom failing, to the heirs after mentioned in the procuratory of resignation ; and the procuratory of resignation was conceived in favour and for new infeftment to be given to the said William Forrester *and the heirs of his body*, whom failing, to certain heirs therein named and designed. On the extinction of the male line of William Forrester, the heir-general descended of his body claimed the estate in right of the destination contained in the procuratory of resignation, maintaining that the procuratory was in itself a perfect conveyance ; that, as the destination was embodied solely in the procuratory (which in fact alone constituted

[1] See *Tinnoch* v. *M'Lewnan*, 26 Nov. 1817, F.C. The general rule that under a gift to A. and his heirs the heir may take in the character of conditional institute has been long established. It has been held that this rule admits of exceptions, but on what grounds is certainly far from clear. See *Findlay* v. *Mackenzie*, 1875, 2 R. 209, which was treated as an exceptional case, and observations on it in Special Case *Halliburton*, 1884, 11 R. 979.

[2] *Forrester* v. *Hutchison*, 11 July 1826, 4 Sh. 824, N.E. 831 ; and see *Shanks* v. *The Kirk-Session of Ceres*, 1797, M. 4295.

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the entail), *that* must be considered as the regulating clause of the deed; and alternatively, that the gift to the heirs-general of William Forrester in the procuratory should be regarded as a subsequent destination, intended to take effect on the failure of the prior dispositive destination to the heirs-male. The Court, however, were of opinion that the destination to the heirs-general of William Forrester in the procuratory was a mere variation of the terms of the prior destination in the dispositive clause to the heirs-male of the same person; and, in that view, that it fell to be corrected by reference to the latter, as the governing clause. The Lord Justice-Clerk observed, that although the procuratory might undoubtedly have constituted the whole entail, yet, as there was in fact a regular dispositive clause with obligation to infeft the heirs there mentioned, and the procuratory was for effecting this infeftment, the destination in the latter clause could not receive effect where it was inconsistent with the former.

828. The case of *Graham* v. *Graham*[1] was a very clear case for the application of this canon of construction. The destination, which was contained in a contract of marriage, was to the granter's eldest lawful son *and his heirs-male* by that marriage, whom failing, to his heirs-male by any other marriage, whom failing, to his heirs-female in the same order, with ulterior substitutions. The deed contained a procuratory of resignation for new infeftment to William Graham and the said heirs of tailzie and provision; and this was followed by a proviso "that the eldest son and *descendants of his body* shall always succeed preferably to the younger sons and their descendants, and that the eldest female and her descendants shall succeed without division." On the death of William Graham's eldest son, the succession was claimed by a daughter of her second son, as nearest *heir-general and descendant of the body* of William Graham, and also by the third son, as heir-male entitled to succeed in virtue of the dispositive clause. It appeared from other parts of the deed that the word descendant was used by the granter to express heirs, both male and female; but in respect that the word was in its own nature a flexible term, and that the destination in which it occurred belonged to the procuratory of resignation, while the destination in the dispositive clause was clear and unambiguous, it was held that the estate was effectually settled upon the heirs-male.

Substitution necessary to complete the destination may be supplied from procuratory.

829. On the other hand, there is sufficient authority for this proposition, that where, by one of the branches of a dispositive destination, the estate is given to an individual, without mention of his heirs, while in the procuratory of resignation infeftment is

[1] *Graham* v. *Graham*, 20 June 1816, F.C.; 14 June 1825, 1 W. & S. 353.

directed to be given to the same individual and his heirs—being of the class or in the order generally pointed out by the other branches of the destination—the procuratory shall stand good as a substitution in favour of the heirs omitted in the leading destination.[1]

Context, in what sense available for purposes of construction.

830. Let us next consider the construction that may be given to terms of destination by the aid of the context of the destination itself. Words designative of heirs may, as we shall see, have a modified or extended construction given to them, so as to bring them into conformity with other branches of the destination to which they bear reference. And where words capable of modifying the whole course of a destination are introduced, either at the beginning or at the end of the clause, without reference to any particular branch of the destination, they shall be held to govern it in all its parts, more especially where they are calculated to give effect to the presumed purpose of constituting an effectual tailzied destination. The first part of this proposition is illustrated by the cases in which a limitation to *heirs of the body* is ingrafted, by construction, upon a subordinate branch of the destination, in virtue of the intention inferred from the context of the clause to confine the destination, or the particular branch of it, to the issue of the *nominatim* substitute. The second point is exemplified in the numerous cases in which a general declaration that heirs-female or "daughters" shall succeed without division has been held to give priority of succession to the eldest heir-female throughout the whole course of the succession.

Limitation to heirs "of the body" by implication: distinction between destinations to heirs-general and those to heirs-male or female.

831. The cases in which a destination has been sought to be limited by implication to heirs of the body are of two classes: *first*, those in which it has been attempted to ingraft such a limitation on a destination to a person named, and his heirs and assignees or heirs whatsoever; *secondly*, where the object has been to impose the like qualification upon a destination to a person named and his heirs-male. The principles of construction applicable to destinations so dissimilar are obviously very different. A destination to A., his heirs and assignees, or to A. and his heirs whatsoever, is, in legal effect, a fee-simple conveyance to A. To convert a grant in fee-simple into a tailzied destination by construction, implies not only an alteration in the character of the estate given to the institute, but also the creation of substitutions which are not to be found in the operative—that is, the dispositive—clause of the conveyance. To ingraft a limitation to heirs of the body upon a destination to heirs-male imports no change in the character of the estate, and introduces no new substitutions into

[1] *Sutherland* v. *Sinclair*, 1801, M. "Tailzie," App. No. 8; *Halliday* v. *Maxwell*, 9 June 1802, 4 Pat. 346; *Maclauchlan* v. *Campbell*, 1757, M. 2312.

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the destination; though, undoubtedly, it cuts down that part of the destination which would have carried the estate to the collateral relatives of the person named, upon failure of the issue of his body. To change the character of the estate, to import new substitutions into the destination upon any other ground than that these substitutions are to be found in plain terms in another part of the deed, would be nothing less than making a new deed for the settlor. But to warrant the restriction of an existing declaration to a limited class of heirs, and the consequent exclusion of remoter heirs, it is sufficient that an intention is apparent on the face of the deed that some other class of heirs, called in the subsequent part of the destination, are, in the intention of the settlor, preferred to those heirs who, by the assumed construction, are held to be excluded.

Destination to A. and his heirs-general, not confined by mere implication to heirs of the body.

832. The leading cases in which the Court has refused to construe a gift to a person named and his heirs as a special destination upon the ground of intention inferred from the deed, or from intrinsic circumstances, are elsewhere fully discussed, and need not be further referred to.[1] The principle of these decisions received its latest illustration in the well-known *Cluny* succession case,[2] where the Court was called upon to construe a direction to trustees to purchase lands, and to execute an entail thereof in favour of the truster's eldest natural son and his heirs whatsoever, whom failing, his younger son and his heirs whatsoever. The younger son predeceased the truster without issue. The surviving son could, of course, have no other heirs than those of his body, and the intention of the truster was very distinctly manifested to the effect that the estate should be settled in the form of a strict entail,—a purpose which could not be accomplished by a destination in the terms directed. Notwithstanding these circumstances, the Court, by a majority of eight to five, determined that the trustees were not entitled, with the view of making effectual the testator's intention, to execute an entail in favour of the truster's son and the heirs of his body; and by consequence, that the son, as fee-simple proprietor, was entitled to require payment of the fund in money.

Effect of subsequent limitations conditioned to take effect upon the death of A. without issue.

833. Very clearly distinguishable from these decisions are the cases in which a conveyance to an individual and his heirs-general, followed by ulterior substitutions, has been allowed to receive effect as a destination, in consequence of the substitutions being expressly conditioned to take effect in the event of the failure of

[1] See Chapter XXVI., Section II., and the cases of *Baillie* v. *Tennent*, as reversed, M. 14,941, 14,944; *Murray* v. *Flint*, M. 14,952; *Suttie* v. *Suttie*, 19 Jan. 1809, F.C.; and *Richardson* v. *Stewart* (the Urrard case), 1 Sh. 105, 2 Sh. (Ap. Ca.) 149.

[2] *Gordon* v. *Gordon's Trs.*, 2 March 1866, 4 Macph. 501.

issue of the institute. In the case of *Hunter* v. *Nisbet*[1] the deed was in the form of a mutual settlement in favour of the longest liver in liferent, and the "heirs of the longest liver in fee," with certain ulterior substitutions, and with this declaration, that in case of the decease of both the settlors "*without heirs of their bodies*," the fee of the property should devolve as therein directed. In *Tinnoch* v. *M'Lewnan*[2] the settlor disponed his heritable estate to his daughter in liferent, in case she should survive him, "and to John Tinnoch, my grandson, his heirs and assignees whomsoever, in fee or property, whom failing *without a lawful child or children existing of his body*," to his (the settlor's) heirs. In the case of *Moodie* v. *Anderson*[3] the narrative of the deed contained equivalent expressions, which were held to control the meaning of the primary destination to heirs whatsoever. In these cases, the expressed intention to bring in the substituted heirs in the event of failure of issue of the institute was allowed to receive effect, the destination to heirs whatsoever being restricted in its application to the non-occurrence of the event on which the substitution was made contingent. But one of the latest examples of this principle of construction is found in the case of *Macewen* v. *Pattison*.[4] The dispositive clause in the deed of settlement commenced with a conveyance of all the settlor's estate, heritable and moveable, to his brother, his heirs and assigns, but with and under the burden of payment of his debts, and of certain legacies therein provided. By a subsequent provision, which was held by the Court to form a part of the dispositive clause, the settlor declared, without prejudice to his brother's right of disposal, that in the event of the latter dying without issue and intestate, and not otherwise disposing of the estate, it should fall and devolve, and he accordingly in that event disponed it, in different portions, to certain other heirs. The Court, while rejecting by a majority the argument that the gift to Alexander Dunn, his heirs and assigns, was limited by construction to heirs of the body, were unanimously of opinion that the substituted destination imported an exclusion of heirs-at-law in a certain event, and that it was effectual as a conditional substitution of the heirs named in it. In all such cases, it is to be observed that the words "die without issue," and the like, are connected by words of reference with the primary destination in such a way as to make its operation conditional on the non-occurrence of the event upon which the substitution is to take effect.

[1] *Hunter* v. *Nisbet*, 14 Nov. 1839, 2 D. 16.

[2] *Tinnoch* v. *M'Lewnan*, 26 Nov. 1817, F.C.

[3] *Moodie* v. *Anderson*, 11 June 1824, 7 Sh. 743.

[4] *Macewen* v. *Pattison*, 27 March 1865, 3 Macph. 779; see also *Pattison* v. *Dunn's Trs.*, 9 March 1866, 4 Macph. 555, affd. 6 Macph. (H. L.) 147.

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"Heir-male" when construed as *heir-male of the body*. Principle of the *Roxburghe* case.

834. The question whether a destination to heirs-male can be limited by construction to heirs of the body, brings before us the *Roxburghe* case, celebrated for Lord Eldon's elaborate judgment, extending over three days, in which every point connected with the construction of destinations was anxiously and minutely examined.[1] The principle affirmed in this case is now beyond the reach of criticism, and it is not our intention to criticise it. We confess that the reasoning upon which Lord Lauderdale's opinion was based[2] appears more adapted to carry conviction to the mind than the more recondite, but, as we think, fallacious line of argument upon which the judgment of affirmance was founded. But so long as the canon of construction laid down by Lord Eldon is kept within its just limits, there is no great risk of the technical meaning of words of destination being thrown open to arbitrary or speculative interpretation. That canon of construction (and it is one of very limited application) may be stated as follows: where an estate is settled by a destination in favour of a disponee or substitute by name, and his heirs-male, and there follows in immediate sequence a substitution or a series of substitutions to other members of the family, *e.g.*, to sisters of the first-mentioned disponee, and their heirs-male or other heirs, then, if the effect of the primary destination, construed according to the natural meaning of the words, would be to carry the estate to the heirs-male general of the first disponee, and so to defeat the right of succession of the other members of the family immediately substituted, the primary destination to heirs-male shall be limited, in construction, to heirs-male of the body. The commentary of the same eminent Judge upon the *Linplum* case[3] establishes the converse proposition, that wherever the effect of the primary destination to heirs-male would be to bring in the immediate collateral relatives of the institute (*e.g.*, where there are brothers) and their descendants preferably to remoter substitutes, the term heirs-male shall be construed according to its natural meaning,

Application of the principle.

835. In the *Roxburghe* entail, the destination was "to the eldest dochter of the said Hary Lord Ker, without division, and yr airis-male, she always marrying or being married to ane gentleman of honourable and lawful descent." To understand how the canon of construction above expressed could be applied to such a destination as this, it must be premised that Lord Eldon, upon the ground afterwards explained,[4] laid down as the first step in the argument that the word *eldest* should be construed relatively to time, and not absolutely; that the eldest daughter meant the eldest

[1] *Ker* v. *Innes*, 20 June 1810, 5 Pat. 320.

[2] See 5 Pat. 464.

[3] 5 Pat. 431-446.

[4] *Infra*, § 841.

to whom or to whose issue the succession had not already devolved, and was equivalent to daughters *seriatim et successivé*. The destination was thus expanded into three successive destinations to the daughters of Lord Harry Ker and their respective heirs-male in the order of seniority. At the time when the competition arose, the lineal male line of the eldest daughter had failed; and the question was, whether the succession should devolve to the heir-male general of that daughter, or to the heir-male of the body of the second daughter. As already explained, a construction was given to the destination which excluded the heirs-male general, on the ground that, if they were admitted, the right of succession of the junior branches of the family would be indefinitely postponed and virtually frustrated.

Roxburghe and *Linplum* cases distinguished.

836. In further explanation of the view of Lord Eldon, which ruled the decision and fixed the law in reference to all similar destinations, it is necessary to add that, in the *Linplum* case,—(1) the destination which was the subject of construction was expressed in favour of Alexander Hay and his heirs-male; (2) that Alexander Hay had several younger brothers, but that neither they nor their issue were substituted in the destination otherwise than as such a substitution was implied in the technical meaning of the destination to the eldest of the brothers and his heirs-male; and (3) that the destination in question was followed up by ulterior substitutions in favour of remoter heirs.[1] The effect of importing the words "of the body" into the destination to Alexander Hay and his heirs-male, would obviously have been to deprive his brothers and their issue of the succession, and to carry the estate over to his remoter heirs. This consideration, doubtless, had weight with the Judges who decided the *Linplum* case; and the observations of Lord Eldon, contrasting the consequences of a flexible interpretation of the term heirs-male in that case with the diametrically opposite consequence resulting from the flexible interpretation of the same term in the *Roxburghe* entail, form a cardinal point in that celebrated judgment. In the one case the limitation of the technical terms, in construction, to heirs of the body, was assumed to be contrary to the probable intention of the settlor, while in the other it was held to be admissible in aid of the probable intention.

Braid v. *Ralston.*

837. The rule of construction established by the decision in the *Roxburghe* case was recognised and applied in *Braid* v. *Ralston*,[2] where

[1] *Hay* v. *Hay*, M. 2315, 3 Pat. 142. The case of *Campbell* v. *Campbell*, formerly cited, M. 14,949, is distinguishable from both the leading cases by the circumstance that there were no special substitutions subsequent to the destination to the institute and his heirs-male.

[2] *Braid* v. *Ralston*, 20 January 1860, 22 D. 433. See also *Campbell's Trs.* v. *Campbell*, 12 May 1838, 16 Sh. 1004, where, in a direction to entail an estate on "heirs-male," the words "of the body" were held to be implied; and *Connell* v. *Grierson*, 14 Feb. 1867, 5

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the destination was to the settlor's eldest son and his heirs-male lawfully begotten, and the heirs of their bodies whomsoever; whom failing, to the eldest daughter of the institute and the heirs of her body, &c. Upon the failure of the institute and the heirs-male of his body, it was held that the succession devolved to his daughter and her descendants, in preference to the heir-male general of the institute; the proximity in blood of the substituted female line being considered a sufficient reason for restricting the prior destination, in construction, to male issue. Finally, in the case of the *Earl of Northesk*,[1] the principle of the *Roxburghe* case was applied to the construction of the words "heirs whatsoever," which, as occurring in one of the substitutions, were interpreted as meaning "heirs of the body." The decision was rested partly on the ground of apparent omission; but this ground of judgment is manifestly insufficient in itself, and is directly opposed to the decision in the *Linplum* case. A better ground of judgment is, that if "heirs whatsoever" in the particular branch were to receive the ordinary meaning, the subsequent substitutions would be rendered nugatory.

Effect of general referential words. Clauses prohibiting division amongst heirs-portioners.

838. It has been observed that the context is also a legitimate source of construction, where it contains general referential words controlling the meaning of the preceding or subsequent parts of the destination. With respect to the aid to be derived from the context in the construction of provisions intended to prevent the division of the estate among heirs-portioners, reference is made to the cases of *Mowat* v. *M'Culloch*[2] and *Swinton's Trs.* v. *Swinton*.[3] In the former case a declaration that the eldest heir-female should succeed without division, interposed between two branches of the destination, was, by reason of its position in the deed, held to apply only to the antecedent part of the destination; while in the latter a similar declaration, introduced at the end of the destination, was held to be applicable to every part of it, including a substitution in favour of the settlor's daughters, who were named collectively in one of the branches of the destination. Where no provision is made with reference to priority of succession among heirs-portioners, the succession necessarily divides whenever it devolves to heirs of that description;[4] and a general reference to a prior settlement, containing a clause of exclusion of heirs-portioners, is not equivalent to the insertion of the clause in the deed of destination.[5]

Macph. 379, where, in a destination in a deed of entail, the term "heirs-female" was construed "heirs-female of the body."

[1] *Earl of Northesk* Petr., 1882, 10 R. 77.

[2] *Mowat* v. *M'Culloch*, 6 Feb. 1823, 2 Sh. 186, N.E. 166.

[3] *Swinton's Trs.* v. *Swinton*, 10 Jan. 1862, 24 D. 278. See cases cited *infra*, § 842 *et seq.*, on the construction of the word "daughter."

[4] *Farquhar* v. *Farquhar*, 28 Nov. 1838, 1 D. 121.

[5] *Macdonald* v. *Lockhart*, 22 Dec. 1842, 5 D. 372.

"Eldest," "second," &c., when used referentially, relate to priority in the destination.

839. Words denoting seniority, as "eldest" or "second" son or daughter, when used in a gift to an individual designatively, must be understood absolutely,—that is, either with reference to birth or to the time of the execution of the settlement. A legacy to the eldest son of A., it is thought, denotes the eldest of the sons surviving at the execution of the settlement; not the eldest surviving son when the succession opens. But in the case of heritable destinations, these words come within the influence of the rule according to which all expressions having a relation to time or order in succession are, if possible, to be held as applied to a *serics of persons.* In this view, the term "eldest" in a destination denotes the senior heir or branch of the succession remaining after failure of an elder heir or branch, except where it is applied to the *stirps* or founder of a line; for in each branch the primary gift is to be understood as made to an individual. Yet even in this case the expression "eldest daughter," when coupled with qualifying terms applicable to a plurality of persons, may fairly be held to mean a series of persons; and on this point the judgment in the *Roxburghe* case,[1] in so far as it found that "eldest daughter, *without division,* and *their* heirs-male," meant daughters in the order of seniority, appears to be unexceptionable. The like construction is put upon the terms in the clause of style "that the *eldest* heir-female shall succeed without division, and exclude heirs-portioners," which is construed as meaning the eldest of the heirs-female capable of taking the succession.[2]

Construction of "eldest daughter" in the *Roxburghe* case.

"Second son, how construed in clauses of devolution.

840. In the construction of shifting clauses, devolving the estate upon a second son in the event of the eldest son succeeding to a title, it is sometimes difficult to determine whose second son is entitled to the inheritance, where the title has passed to two or more brothers in succession. *In dubio* it is held that the heir answering to the description, who is nearest in blood to the entailer or institute, has the preferable claim.[3]

"Son," "daughter," &c., how far flexible as to meaning.

841. Where a destination is expressed in popular language, a greater latitude of interpretation is admissible than in those cases where technical terms only are used. But the principles of construction are essentially the same. The evidence of intention to use language in a different sense from what it naturally bears, must be found within the deed itself, and generally in the immediate con-

[1] *Ker* v. *Innes*, 5 Pat. 320; 6 W. & S. (App.). See the formal judgment upon this point.

[2] See cases cited *infra*, § 843. And see the Lord Justice-Clerk's observations in *Shepherd* v. *Grant*, 1 Dec. 1836, 15 Sh. 176; affirmed 3 S. & M'L. 255.

[3] *M. of Bute* v. *Stuart Wortley*, 4 Mar. 1803, 4 Pat. 450. As to whether the heir-substitute to whom a shifting clause is applied may keep the estate until he shall have a second son, see *Hay* v. *M. of Tweeddale*, 6 April 1773, 2 Pat. 322, and M. 15,425.

text. This part of the subject derives a special interest from the frequency with which the word "daughter" is found associated in destinations with proper terms of destination, leading to the inference that it is used in the sense of heirs-female, or at least in a sense expressive of female relationship in a more general sense than that of immediate descent. The cases have for the most part been already referred to, in illustration of the construction of the special destinations in which they occurred. For our present purpose it will be sufficient to indicate the application of the principles of interpretation by which they are governed.

"Daughter" construed as heir-female, when used in conjunction with that term.

842. The word "daughter," when associated in a destination with "heir-female," is susceptible of being identified in construction with the latter term. It is true that heirs-female are not always daughters; but daughters, if heirs at all, are necessarily heirs-female; and therefore, where, as in the *Kinfauns* case,[1] the estate is destined to the eldest daughter *or* heir-female of a person designated, and it becomes necessary either to reject the latter expression, or to give to the former a construction by which it is held to be identical with, or illustrative of, the more technical term, that construction is to be preferred which maintains the consistency of the destination, without sacrificing any part of it. In this case it is to be observed there was no possibility of construing the two terms connected by the conjunction "or" as separate destinations, intended to take effect *seriatim;* for there is no *class of heirs* known to law who could be supposed to be represented by the term daughters other than the class named in conjunction with them, namely, heirs-female. Where, however, two distinct classes of heirs are introduced into a destination, coupled with the word "or" (as, for example, "heir-male *or* eldest heir-female of the body"), the heirs-female are held, in virtue of the position of the words in the deed, to be postponed or substituted to the *heirs-male of the body* of the institute; the words "of the body" in the destination quoted being obviously intended as a restriction upon both branches of the succession.[2]

"Daughter," how construed in clauses applicable to the succession of heirs-portioners.

843. The flexible construction of the word "daughter" may be farther illustrated by the cases in which it is used in clauses intended to secure the transmission of the estate without division. Thus, in *Martin* v. *Kelso*,[3] where a deed of entail contained a clause empowering the heirs in possession, "so often as their apparent or presumptive heirs are females, to settle the estate upon a younger

[1] *Blair* v. *Lyon*, 1739, 5 Br. Sup. 663. See also *Shepherd* v. *Grant*, 28 May 1838, 3 S. & M'L. 255, and 15 Sh. 173.

[2] *Leslie* v. *Leslie*, 10 May 1774, 6 Pat. 792.

[3] *Martin* v. *Kelso*, 19 July 1853, 15 D. 950.

daughter in preference to the elder daughter, or to pass by such daughters altogether and settle the estate upon the presumptive heir-male," it was held that the term daughters, as used in this clause, was not limited to daughters of the heir exercising the power, but included his heirs-female, being daughters of a former heir in possession. In this case, the proper construction of the term daughter was indicated by the introductory part of the context, which prescribed the condition or event upon which the power was to be exercised, and which in its terms clearly applied to all cases of prospective female succession; and it may be inferred from the opinions of the Judges that, but for the evidence of intention afforded by the introductory part of the clause, the power would not have been held to extend to collateral succession.[1] Clauses of this kind, which from their nature are much less technical in their language than other parts of the destination, may indeed be fairly interpreted on the principle of giving effect to the intention evinced by the general tenor of the destination; and accordingly the words "excluding heirs-portioners," which, if literally construed, would have the effect of depriving female heirs of any right to the succession, are held equivalent to an exclusion of the collective succession prescribed by law, with a substitution of the several heirs-portioners and their issue in the order of seniority.[2]

"Son," "daughter," &c., when used designatively, receive their natural meaning.

844. We have already seen that words designative of relationship, such as son or daughter, when used in a connection which shows that they were intended to be applied to individuals, and not to classes of persons, are not to be bent from their natural meaning; and the case of *Lady Essex Ker* v. *Innes*[3] is an authority for the proposition that such words are to be interpreted according to their natural meaning where they are employed to designate the heir-substitute or ancestor from whom the succession is to flow in one of the branches of the destination.

Words of destination in accessory conveyances interpreted in conformity to destination of the principal subject.

845. In closing this subject, reference may be made to a class of cases in which technical terms of destination are held to be subject to construction, by reason of their occurrence in a conveyance of an accessory subject, or right collateral to an antecedent grant. In such cases, where the regulation of the order of succession is not the primary object of the deed, and where it is plainly not the intention of the granter to derogate from the order of succession prescribed in the destination of the principal subject,

[1] See farther on the construction of this word in money settlements, *Crs. of Redhouse* v. *Glass*, M. 2306; 5 Dec. 1744, 6 Pat. 681; and Mr. Sandford's observations, Treatise on Entails, p. 67. Also *Ewing* v. *Miller*, 1747, M. 2308.

[2] *Swinton's Trs.* v. *Swinton*, 10 January 1862, 24 D. 278; *Pratt* v. *Abercromby*, 18 Nov. 1858, 21 D. 19.

[3] *Lady Essex Ker* v. *Innes*, 26 Feb. 1812, 5 Pat. 579.

it has been held that, without any infringement of the recognised principles of interpretation, a grant to the disponee or heir in possession of the principal estate and his heirs may be construed as applying to the heirs of the subsisting investiture.[1]

Construction of power to alter destination by nominating heirs.

846. It sometimes happens that a branch of the destination is introduced in the shape of a power to name heirs. Thus the estate may be destined to a series of substitutes, whom failing, to heirs to be named in a separate deed by the granter; or the heir in possession may be empowered, in the prospect of the succession devolving upon heirs-portioners, to make a new settlement of the estate upon them and their issue, either in the order of seniority or according to discretion.[2] Where a power of nomination is duly exercised, the heirs nominated are held to be included in the original destination, and they take their place in the succession accordingly in their order.[3]

SECTION IV.

Heir-Substitute, whether taking as Disponee or as Heir of Provision.

Meaning and effect of the distinction.

847. The distinction suggested by the title of this section is chiefly important in relation to the completion of titles under deeds of destination. Where the heir-substitute succeeds to the estate as heir of provision, he must complete his title as an heir, that is, either by service and infeftment, or by entry with the superior under a precept of *clare constat*. Where the succession is taken in the character of disponee or institute, the estate is transferred by the disposition, and no service or proceeding in the nature of *aditio hæreditatis* is requisite either to vest the right or to complete the title.

Heir, though called as a substitute, may take as a disponee.

848. In any inquiry as to the mode of making up a title under an entail or deed of destination, the question to be considered is not as to the character in which the heir is called to the succession, but as to the character in which he takes the estate. Every person named in a destination, except the first, is called as a substitute. But a substitution includes a conditional institution of the same individual in the event of the persons previously named in the

[1] *Greenock* v. *Greenock*, 1736, M. 5612; *Duke of Hamilton* v. *Selkirk*, 1740, M. 14,935; *Hay* v. *Crawford*, 1698, M. 14,899, cited in Sandford on Entails, p. 92; also *Duke of Roxburghe* v. *Wauchope*, 21 Jan. 1823, 2 Sh. 141, N.E. 130.

[2] *Martin* v. *Kelso*, 15 D. 950, cited *supra*, § 843.

[3] *Stewart* v. *Porterfield*, 24 May 1826, 2 W. & S. 369; and on remit from the House of Lords, 13 Nov. 1829, 8 Sh. 16; judgment affirmed 23d Sept. 1831, 5 W. & S. 515; *Earl of Strathmore* v. *Strathmore's Trs.*, 1 Feb. 1837, 15 Sh. 449, affirmed 30 July 1840, 1 Rob. 189.

destination predeceasing the granter. This principle was evidently overlooked in some of the earlier cases, and its non-recognition led Mr. Sandford[1] into the mistake of condemning the principle of decision in the cases of *Colquhoun* and *Fogo*,—cases which have since been universally approved, and which have very materially simplified this branch of the law of succession.

Where granter dispones to himself, the person first succeeding takes as heir-substitute of provision.

849. The most usual case is that where the granter dispones to himself, whom failing, to a series of heirs-substitute. Here the granter is the institute, and his right vests immediately. The heir next entitled to succeed under the destination would accordingly, in this case, take the estate by way of substitution, and he must be served heir of provision to the granter, otherwise he would not, if he died before the passing of the Conveyancing Act, 1874, take a vested interest.[2] It is immaterial, in this question, whether the heir-substitute is called to the succession in immediate sequence to the institute, or whether he succeeds in consequence of the death of other heirs-substitute called before him.[3] The rule has been applied to the case of a settlement by two persons to each other and the survivor, whom failing, to heirs designed.[4]

Where deed delivered to institute in granter's lifetime, the person *next* succeeding takes as heir-substitute.

850. Again, where a deed of settlement is in the lifetime of the granter delivered to the institute as his proper writ, so as to give him an immediate estate in fee, there is no longer a possibility of conditional institution, and the heir-substitute next succeeding, even where that heir is the granter himself,[5] must make up his title as heir of provision to the institute. If, in the events that happen, the granter would succeed as conditional institute according to the conception of the deed, the result is that the settlement is ineffectual, and the fee remains untransferred in the granter.[6] The result is similar where the granter retains the liferent of the estate; no service is necessary on the liferenter's death; but on the death of the fiar, the next substitute must be served heir to him.[7]

Liferenter held to be the institute where fee given to heirs unborn.

851. Again, where a settlor dispones heritable estate, whether to himself or to another in liferent, and to the heirs of the body of the liferenter in fee, whom failing, to other heirs, then, if the liferenter have no child at the date of the settlement,[8] he is held to be

[1] Sandford on Entails, pp. 506-12.

[2] *Young's Trs.* v. *Young*, 19 July 1867, 5 Macph. 1101, and cases there cited.

[3] *M'Culloch* v. *M'Lcod*, 1731, M. 14,366; *Livingstone* v. *Lord Napier*, 1757, M. 15,409, M. 15,418, and 5 Br. Sup. 885; *Hamilton* v. *Hamilton*, 1714, M. 14,360, as to which see observations in *Young's Trs.* v. *Young*, *supra*.

[4] *Main* v. *Lamb*, 1880, 7 R. 688.

[5] *Hay* v. *Hay*, *infra*.

[6] *Birnie* v. *Simpson's Trs.*, 1893, 20 R. 481.

[7] *Hay* v. *Hay*, 1758, M. 14,369, 5 Br. Sup. 351; *Kerr* v. *Howison*, 1708, M. 14,357; *Denniston* v. *Crichton*, 5 Feb. 1824, 2 Sh. 678, N.E. 570.

[8] And perhaps even where he has a child if that child is not named. The law on this point is not very clearly defined. See Chapter XXXIII., Section II. (Gifts to Children).

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himself the institute or fiar, in order to satisfy the rule of law that a fee cannot be *in pendenti*. In such a case, the successor, whether a descendant of the liferenter, or a remoter substitute, ought to be served heir of provision to the liferenter in order to take the fiduciary fee out of his *hæreditas jacens*.[1] The construction is the same in the case of a direct disposition to heirs *in posse* without reservation of a liferent. The fee in this case also remains with the granter, and falls to be taken up by service as heir of provision to him, precisely as if the granter had instituted himself.[2]

Mortis causa settlement to disponee by name (who predeceases), and heirs of tailzie: Conditional institution.

852. The only case remaining to be considered is that of the ordinary form of destinations in deeds of settlement, where the grant is to a person in life by name with substitutions, the operation of the deed being suspended during the granter's lifetime. In this case, if the person instituted survive the granter of the deed, he takes the estate as a disponee. On his death, the next surviving heir will be served heir of provision to him, and subsequent heirs must in like manner connect themselves by service with the last heir who took a vested interest in the estate. Where the institute predeceases the settlor, it was for a long time supposed that it was necessary for the heir next entitled to succeed to connect himself by service either with the settlor or with the institute, conflicting decisions being given upon the point.[3] But it is now settled by the cases of *Colquhoun*[4] and *Fogo*,[5] that in this case the heir succeeds to the estate as immediate disponee in virtue of the conditional institution which is implied in all destinations. It is obviously immaterial to this question whether the conditional institute is mentioned by name in the deed of settlement, or designatively, *e.g.*, as one of the heirs of the body of the institute. In either case the estate vests by the words of the disposition, without the necessity of a service or declaratory proceeding to prove the propinquity.[6]

Doctrine of conditional institution, whether applicable to designative destinations.

853. In the case of a disposition to heirs designated—*e.g.*, to the granter's heirs-male, whom failing, to other heirs named or designed—it was supposed by conveyancers, on the authority of the case of *Gordon* of Carleton, and the other cases noted below, that in the event of the heirs first named predeceasing the granter, the fee

[1] *Dundas* v. *Lord Dundas*, 23 Jan. 1823, 2 Sh. 445, N.E. 133. *Frog's Crs.* v. *His Children*, 1735, M. 4262; *Lillie* v. *Riddel*, 1741, M. 4267; *Douglas* v. *Ainslie*, 1761, M. 4269. And in reference to the case of a disposition to spouses in conjunct liferent, and to the heirs of the marriage in fee, see *Peacock* v. *Glen*, 22 June 1826, 4 Sh. 742, N.E. 749.

[2] *Gordon* v. *Gordon's Crs.*, 1748, M. 14,366-14,368,

[3] *Campbell* v. *Campbell*, 1770, M. 14,949; *Mackenzie* v. *Mackenzie*, 24 Nov. 1818, F.C.; *Murray* v. *Murray*, 21 May 1833, 11 Sh. 629.

[4] *Colquhoun* v. *Colquhoun*, 16 Dec. 1828, 7 Sh. 200; remitted 17 Feb. 1831, 5 W. & S. 32; opinions, 9 Sh. 911.

[5] *Fogo* v. *Fogo*, 25 Feb. 1840, 2 D. 651; remitted 22 June 1841, 2 Rob. 440; opinions, 4 D. 1063.

[6] *Colquhoun* v. *Colquhoun*, *supra*.

would remain in the granter himself, and would have to be taken out of his *hæreditas* by service.[1] But the principle established in *Fogo's* case clearly applies to designative institution as well as to the case of a destination to an institute by name, and it was so held by a Court of seven judges in the case of *Hutchison*,[2] where it is shown in the Lord President's opinion that the decisions referred to in the preceding note proceeded on specialities of construction or title, and are inconclusive on the question.

Where institute contravenes the entail, next heir may serve heir of provision to the entailer.

854. In the case of a contravention of an entail by an heir in possession, the Statute 1685 entitles the next heir to sue for declarator thereof, and "serve himself heir to HIM who died last infeft in the fee, and did not contravene without necessity anyways to represent the contravener." The question has been proposed, what is to be done if the contravener is the institute? Mr. Sandford was of opinion that a service to the granter would be inept, "because the Statute says that the service must be to the last *heir* who did not contravene, and as the granter is not an heir, he cannot be held as pointed out in this description."[3] But the fact is, that the word "heir" does not occur in the Statute in this connection, nor is there any serious objection to a service to the granter in such circumstances.

[1] *Gordon* v. *Gordon's Crs.*, 1748, M. 14,368; *Peacock* v. *Glen*, 22 June 1821, 4 Sh. 742, N.E. 749; *Anderson* v. *Anderson*, 22 June 1822, 10 Sh. 696.

[2] *Hutchison* v. *Hutchison*, 1872, 11 R. 230.

[3] Sandford on Entails, p. 530.

CHAPTER XXV.

EVACUATION OF DESTINATIONS BY CONVEYANCES AND GENERAL SETTLEMENTS.

1. Evacuation of Substitution by new Investiture or Conveyance.

2. Evacuation of Destinations by General Settlements.

SECTION I.

Evacuation of Substitution by new Investiture or Conveyance.

Heir making up title under a simple destination may alter *omni habili modo*.

855. The institute or heir under a simple destination may either make up his title under the settlement, or, if he is also heir-at-law or heir of the subsisting feudal investiture, he may make up his title in the proper character; in which case he has two titles,—a feudal title as heir-at-law or of the investiture, and a personal title as disponee or heir under the settlement. The case where the heir makes up his title under the settlement requires no discussion. His succession continues to be regulated by the destination contained in the settlement until that destination is altered, and in the case of entailed estates the special destination remains effectual until it is altered, notwithstanding the disentail of the estate under the provisions of the Entail Amendment Acts.[1] A disponee or heir of provision under a deed of destination not fortified by irritant and resolutive clauses, is an absolute and unlimited fiar, having all the powers of a proprietor in fee-simple.[2] The only difference is, that in the case of a person possessing under a deed of destination, the destination continues to regulate the succession until it is altered.

Effect of making up a title as heir-at-law or of investiture. Possession on double titles.

856. In the case of a title being made up as heir-at-law or heir of the investiture, if the proprietor should be desirous of altering the succession to the estate, some care is requisite in order that this object may be accomplished in such a manner as will defeat

[1] *Gray* v. *Gray's Trs.*, 1878, 5 R. 820.

[2] In the case of a simple destination contained in a marriage-contract, the prescribed succession is only obligatory in so far as concerns the right of the heir of the marriage. He, therefore, is entitled to alienate the estate gratuitously as soon as he acquires a vested interest in it; *Routledge* v. *Carruthers*, 19 May 1812; 16 Dec. 1819, F.C.; 2 Bligh, 692, 6 Pat. 597.

the outstanding personal destination in the deed of settlement; for, if the settlement were allowed to remain as a personal deed, it would, as a consequence of the doctrine of double titles, be held to regulate the succession to the estate, notwithstanding the alteration of the destination in the feudal title. The law in relation to succession where property is possessed upon double titles may be reduced to the following propositions:—

Destination subsists notwithstanding possession on a title made up as heir-at-law or of investiture.

857. (1.) The mere completion of a title in the character of heir-at-law,[1] or heir of the feudal investiture,[2] does not evacuate or defeat the destination in the personal deed. It is presumed that the title is so completed as a matter of convenience, and not with the intention of altering the destination of the settlement from which the title of the heir is derived. The heir is held to possess on both titles, and it is an established rule that in all such cases the personal deed is the governing title, and that the destination contained in it continues to regulate the succession. Where the destination of the settlement happens to be coincident with the legal order of succession in one of the branches, an estate may be possessed for several generations upon services or precepts of *clare constat*, expede by the successive proprietors in the character of heirs-at-law; and yet when the lines of succession come to diverge, the estate will go to the heir pointed out by the personal deed. In this way, latent personal titles have been brought into operation after the elapse of more than a century from their dates.[3] The cases do not recognise any distinction between entries by service and entries by precept of *clare constat* or charter of confirmation and precept,[4] neither title being held to import anything more than a continuance of the subsisting investiture.

Personal destination evacuated by obtaining a new investiture from the superior.

858. (2.) Where an heir who has made up his title under the subsisting investiture in the manner explained afterwards obtains a new investiture from the superior by resignation and charter of resignation, it is held that he thereby evacuates the destination in the personal deed and alters the course of succession—the two cases being distinguished, continuing the subsisting investiture, which has no effect upon the destination in the personal deed, and making a new investiture by resignation and charter of resignation, which is equivalent to an alteration of the destination.[5] Such new

[1] *Durham* v. *Durham*, *infra*; *Snodgrass* v. *Buchanan*, 1806, M. "Service of Heirs," App. No. 1; *Ogilvie* v. *Erskine*, 26 May 1837, 15 Sh. 1027.

[2] *Smith and Bogle* v. *Gray*, 1752, M. 10,803; *Zuille* v. *Morrison*, 4 March 1813, F.C. See also 2 Ross' L. Ca. pp. 577-596.

[3] See *Ogilvy* v. *Erskine*, 15 Sh. 1027; *Durham* v. *Durham*, M. 11,220; 5 March 1811, 5 Pat. 482.

[4] In *Zuille* v. *Morrison*, 4 March 1813, the title was made up by precept of *clare constat*; as also in the case of *Pattison* v. *Dunn's Trs.*, *infra*.

[5] *Harvie* v. *Craig Buchanan*, 12 Dec.

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investitures were frequently expede under the old election law for the purpose of creating freehold qualifications; and in such cases it was ruled that the immediate purpose was immaterial, and that the grantee ought to have taken care to have the proper destination inserted in the charter, if he did not contemplate an alteration of the order of succession.[1]

Destination evacuated by disposition or resettlement of the estate.

859. (3) An heir who has made up a title under the subsisting investiture may alter the destination by disponing or re-settling the estate. It is not necessary to the accomplishment of this purpose that the heir should begin by making up a separate title to the estate under the personal deed of settlement. Being in the full right of the estate under both titles, the heir, by his disposition or procuratory, has the capacity effectually to alienate the estate. The act of alienation necessarily extinguishes or transfers every right that was in the granter, and puts an end at once to the personal title and to the destination which was ingrafted on it.[2]

Whether destination of base fee is evacuated by its consolidation with the superiority.

860. The case of *Pattison* v. *Dunn's Trustees*[3] raised two interesting points in this branch of the law—1*st*, Whether the consolidation of a base fee held under a title containing a special destination with the superiority has the effect of evacuating the destination? and, 2*dly*, Whether, in the case of the superiority being possessed under a special destination different from that of the right of property, the base fee or right of property is thereby brought under the destination of the superiority? The judgment affirmed the first and negatived the second of these questions.

SECTION II.

Evacuation of Destinations by General Settlements.

Historical interest of the question.

861. It is a remarkable example of the unwillingness of lawyers to decide questions of principle, that the question of the effect of general on special conveyances should have been agitated for not less than 120 years before it was finally set at rest. The case of *Farquharson*, argued in the House of Lords in 1759, affirmed the principle that a testator's intention to use general words in a sense exclusive of a particular subject may be manifested by his accession to or concurrence in a settlement of the same subject by a predecessor in title, or by other acts showing that he regarded

1811, F.C.; *Molle* v. *Riddell*, 13 Dec. 1811, F.C.; 2 Ross' L. Ca. pp. 602-631.

[1] *Molle* v. *Riddell*, *supra*.

[2] *Edgar* v. *Maxwell* (Elshieshiells), 1736, M. 3089; 2 Ross' L. Ca. p. 596; 31 May 1742, 1 Pat. 334.

[3] *Pattison* v. *Dunn's Trs.*, 20 July 1866, affirmed July 23, 1868, 6 Macph. (H.L.) 147.

lands destined to heirs-substitute by such a settlement as not being within the scope of his testamentary disposition.[1] But this decision left open the question whether general words in a *mortis causa* disposition will suffice to evacuate the destination of a special subject to which the testator has succeeded as disponee or heir of provision, where there is no evidence of the testator's state of mind on the subject other than what the *mortis causa* disposition offers, and this question came before the House of Lords for the first time for decision in 1880, and was determined in the affirmative.[2] The question had come before the Court a few years before in another case, and by a majority of the judges of the whole Court was decided in the same sense.[3]

Case of a general disposition by a testator who is the institute under his special settlement.

862. The whole law on this subject is contained in Lord Selborne's judgment in *Campbell* v. *Campbell*, from which it may be convenient to quote the essential points :—

1. "If the testator has himself made a prior settlement, in which after himself there is a special destination to heirs-substitute —whether such settlement is or is not contained in a proper *mortis causa* deed—general words of disposition in a subsequent *mortis causa* deed will not evacuate the destination to those heirs-substitute; and the special destination will equally prevail if the settlement of the particular property is of later date than the general disposition. This may be explained upon an intelligible principle. In such a case both the instruments express the mind and the will of the same person,—the one as to a particular part, the other as to the generality of his estate. . . . There was nothing, therefore, inconsistent or unreasonable in reading and construing two such instruments together, and treating the general as subordinate to and exclusive of the particular intention,—the effect of which was to make the general words residuary in their operation."[4] To this head are referable the undernoted cases,[5] selected from the authorities cited in *Thoms*, and two others subsequent in date to *Thoms*, one of which is of the ordinary type,[6] and the other is a case of a purchase of later date than the general

[1] *Farquharson* v. *Farquharson*, 1759, 6 Pat. 724, affirming Mor. 2290.

[2] *Campbell* v. *Campbell*, 1880, 7 R. (H.L.) 100, affirming 6 R. 310.

[3] *Thoms* v. *Thoms*, 1868, 6 Macph. 704.

[4] 7 R. (H.L.), at p. 101. In *Connell's Trs.* v. *Mrs. Connell's Trs.*, 1886, 13 R. 1175, this principle was extended to the case of moveable bonds, stock certificates, and similar securities, in which the purchaser had caused special destinations to be inserted.

[5] *Weir* v. *Steill*, 1745, M. 11,359, 5 B.S. 224; Elchies, *voce* Presumption, No. 17; *Strachan* v. *Farquharson*, 1732, M. 11,356; *Flemings* v. *Fleming*, 1800, M. "Implied Will," App. No. 1; *Thomson* v. *Lyell*, 1836, 15 S. 32; *Skene* v. *Skenes*, 1725, M. 11,354; *Dundas* v. *Dundas*, 2 Pat. 618, reversing M. 15,585.

[6] *Walker's Exr.* v. *Walker*, 1878, 5 R. 965. See also *Lang's Trs.* v. *Lang*, 1885, 12 R. 1265, a case of a mutual settlement.

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disposition, and therefore corresponding to the second case described by Lord Selborne.[1]

Case of a general settlement by an institute or heir of provision.

2. The next case is that of a general settlement made by the institute or heir of provision under a subsisting destination. This is the case of *Thoms* v. *Thoms* and *Campbell* v. *Campbell*. "By the law of Scotland the institute or the heir in possession under a settlement or an entail without fetters is absolute fiar. The property is his; it is liable for the payment of his debts; his disposition operates upon it *per directum*, and not by way of revocation or as in the exercise of a power. The heirs-substitute take only for want of a disposition by him, and they then take as heirs-nominate instead of the heir-at-law. It would seem, therefore, on principle that there can be nothing in the mere nature of such a special destination to prevent property so settled from passing by a general disposition as part of the *universitas* of the fiar's estate."[2]

Element of testator's knowledge.

3. In one of the cases of the last century which went to the House of Lords,[3] it was held that property which had vested in a testator (subsequently to a general disposition of all his present and future estate by a *mortis causa* deed) under a settlement made by his son, of which he remained ignorant till the time of his death, did not pass by the general *mortis causa* disposition, but went to the heirs-substitute under the son's settlement. This case was considered in the leading case of *Campbell*, and formally overruled as being contrary to principle and to the later case of *Leitch*[4] in the Lords, and to *Thoms* v. *Thoms*, which were approved.

Intention to evacuate, and competency of evidence as to intention.

4. There remains for consideration the question of the effect of a general conveyance by a testator who is disponee or heir of an estate under a subsisting settlement, where it is alleged that the testator did not intend to convey the settled estate. It may be sufficient to consider the latest case, which is also the most authoritative, because it was the subject of an appeal to the House of Lords which was decided a few years earlier than the leading case. The history of the case of *Glendonwyn* is this:[5]—It came into the Court of Session not many years after the decision of the whole Court in the case of *Thoms*. Now, if the principle of the decision in *Thoms* be, as put by Lord Selborne in *Campbell's* case, that words in a testamentary instrument descriptive of the testator's whole estate, present and future, should, in the absence of a controlling context, be held to pass what they properly describe, it would

[1] *Webster's Trs.* v. *Webster*, 1876, 4 R. 101. A destination to the "heirs and assignees" of the proprietor and testator is, of course, not a special destination in the sense of this rule,—*Philip* v. *Philip*, 1885, 13 R. 529.

[2] 7 R. 100, per Lord Selborne.

[3] *Campbell* v. *Campbell*, 1743, 1 Pat. 343.

[4] *Leitch* v. *Leitch*, 1829, 3 W. & S. 366.

[5] *Glendonwyn* v. *Gordon*, 1873, 11 Macph. (H.L.) 33, affirming 8 Macph. 1075.

seem to follow that extrinsic evidence is not admissible to prove the intention of the testator to use the words of general conveyance in a restricted sense. The Court of Session, however, in accordance with precedents, all except that of *Farquharson* being of very recent date, took an intermediate view. Rejecting parole evidence and inferences suggested by private correspondence, the Court admitted what may be described as real evidence, *i.e.*, the records of actual transactions by the deceased which were deemed to be inconsistent with an intention to treat the settled estate as estate subject to her disposal. The estate in question was held by the testatrix, Miss Glendonwyn, under an imperfect entail—an entail in which the fettering clauses were not applied to the institute; and the evidence established that Miss Glendonwyn, apparently in ignorance that the estate was subject to her debts and deeds, had borrowed considerable sums of money at high interest on her estate for life, and had insured her life as a collateral security for the repayment of the capital.

Observations on the authorities as to such evidence.

863. Now, assuming the relevancy of this evidence, what does it prove? Only this, that the testatrix did not know that she had the power of disposing by will of the imperfectly entailed estate. It does not prove, and has no tendency to prove, that she had not the will to dispose of all the estate that was within her power, including this very estate, if she were free to dispose of it without incurring an irritancy. It must now be taken that the eighteenth century case of *Campbell* was wrongly decided, and that the testator's ignorance of the fact that he had succeeded to the estate of his son was no reason for denying effect to the general conveyance as a conveyance to that estate. But it must also be conceded that no sound distinction can be taken between the case of a testator who is ignorant that he has acquired any right to a definite estate, and the case of a testator who knows that he has succeeded to an estate, but believes himself to be only a limited owner of it. If the general disposition takes effect in the former case, it ought to do so also in the latter. When the case of *Glendonwyn* went to the House of Lords, somewhat discordant views were expressed as to the principles applicable to general and special conveyances; and it may be affirmed, without disrespect to the judgment of the House, that the grounds of decision are not satisfactory, especially as Lord Selborne, in his very luminous judgment in *Campbell*, sets up the older case of *Leitch* v. *Leitch*, and affirms that his own opinion in *Glendonwyn* was coloured by what he now considers an erroneous view of *Leitch's* case.

864. Such being the state of the latest authorities on the question as to extrinsic evidence, it is hardly worth while discussing

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Latest opinions on this subject.

the earlier decisions.[1] There has been only one case subsequent to *Glendonwyn* in which extrinsic evidence was admitted, the case of *Gray* v. *Gray's Trustees*,[2] and in this case the facts were held to be consistent with an intention to convey the settled estate. The following sentence from the opinion of the late Lord President may be taken to be the latest expression of the mind of the Court respecting the elements extrinsic to the general conveyance which may be considered in determining the extent of its operation:—"The relation which the granter of the deed bears to the estate, the condition of the parties interested in the previous settlement of the estate, and their relation to the granter of the deed, the mode in which the granter of the deed has dealt with the estate which is said to be conveyed in the deeds and transactions regarding that estate, and also the way in which he has dealt with his succession generally, if the general disposition is a disposition intended to settle the affairs of the truster, are fair elements for consideration in dealing with the question of intention."[3]

Suggested rejection of evidence as to intention to evacuate.

865. The law, as it stands at present, therefore provides ample material for the formation of speculative opinions as to the intentions of testators who lean to generalisation in the expression of their wills. The subject seems to call for further consideration with a view to a final determination whether evidence of intention should be altogether rejected, or, if this cannot be done, whether it ought not at least to be confined within limits somewhat narrower and more strictly defined.

[1] The following is believed to be a complete list of these cases: *Farquharson* v. *Farquharson*, 1756, M. 2290; *Hepburn* v. *Hepburn*, 1860, 22 D. 730; *Chisholm* v. *Chisholm-Batten*, 1864, 3 Macph. 202; *Collow's Trs.*, v. *Connell*, 1886, 4 Macph. 465; *Catton* v. *Mackenzie*, 1870, 8 Macph. 1409; *Glendonwyn* v. *Gordon*, *supra*; *Gray* v. *Gray's Trs.*, 1878, 5 R. 820.

[2] *Gray* v. *Gray's Trs.*, 1878, 5 R. 820.

[3] 5 R. 824. The latest decision on this subject is *Watson's Trs.* v. *Hamilton*, Jan. 31, 1894, 31 S.L.R. 374.

CHAPTER XXVI.

OF ENTAILS.

1. Entailer's Title; Subject and Form of the Entail.
2. What constitutes a Tailzied Destination.
3. Of Imperfect Entails.

Limits of the subject.

866. In this and the four consecutive chapters the writer has sought to present a complete view of the Law of Entail considered as a branch of the law of succession. This includes the general theory of entails, and the interpretation of their formal clauses; the vesting of the entailed estate and the powers of the heir in possession; the completion of the titles of heirs of provision, and, what has already been considered,—the construction of heritable destinations. The exposition of the statutory powers of heirs of entail in relation to charging the estate with incumbrances, selling, letting on lease, feuing, and the like, and in relation to the mode of effecting a disentail of the estate, pertain to the subject of conveyancing, and are foreign to the object and scope of a work relating to succession.

SECTION I.

Entailer's Title; Subject and Form of the Entail.[1]

What may be the subject of an entail.

867. Every description of feudalised heritable estate of which the proprietor is free to dispose may be the subject of an entail, as lands, houses, teinds, patronages, fishings, reversions,[2] and it

[1] The cases relating to attempts to create entails of moveables are discussed above,—*voce* "Perpetuities," Chapter XV., Section II.

[2] *Chisholm* v. *Chisholm-Batten*, 9 Dec. 1864, 3 Macph. 202. An ancestor of the entailer having borrowed money on the security of part of his estates, granted a proper wadset of the mortgaged lands to his creditor, during the currency of which, the right of reversion was kept up by being described as such in the titles of the debtor's estate. The wadset was ultimately extinguished by a deed of discharge and renunciation, which was recorded in the Register of Sasines, but the security title was never consolidated with the estate by resignation *ad remanentiam*. The entailer, without adverting to the virtual extinction of the wadset, conveyed, in terms of the description in the title-deeds, *inter alia*, his "right of reversion" in the lands in question. The Court held (1) that the right of reversion under a proper wadset was of the nature of a radical right to the lands, and might competently be entailed; and (2) that as a question of intention, the entail of the "right of reversion," in the circumstances of the case, constituted a good entail of the subject of the security.

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would seem, adjudications when perfected by charter and sasine, though not followed by decree of declarator of expiry of the legal.[1] In a modern case, a doubt was expressed by a learned judge as to the competency of entailing burgage subjects.[2] In practice, burgage subjects were not infrequently included in entail destinations; and the practice was sanctioned by the Titles to Land Act, 1860.[3] The question has ceased to be practical in consequence of the abolition of the distinction between feudal and burgage holding. With regard to heritable subjects not capable of being feudalised, the tendency of judicial opinion is in favour of the competency of entailing such subjects.[4]

Pro indiviso interests in land may be entailed.

868. It is settled by authority,[5] if authority were needed, that a *pro indiviso* interest in heritable estate may be entailed. It was also found that an entail of such subjects will subsist if the estate be subsequently divided, and that it is not necessary that the disposition giving effect to the decree of division should enter the Register of Tailzies.[6]

Admissibility of extrinsic evidence.

869. A question was raised in a later case[7] as to the competency of resorting to extrinsic evidence for the purpose of identifying a part of the subject of conveyance, the description of which was alleged to be ambiguous or uncertain. By disposition and deed of tailzie, David Earl of Leven conveyed to a certain order of heirs certain lands and heritages, and, *inter alia*, the manor-place of Monimail and mansion-house of Melville, with certain other subjects said to have been erected into the *lordship and barony of Monimail*, and certain parts of the town and lands of Utherogill, "under the several restrictions, provisions, and clauses irritant and resolutive, with respect to *the lands and barony of Melville* and lands of Utherogill contained in the procuratory of resignation hereinafter ingrossed." By the procuratory of resignation *the lands, lordship, and estate of Melville* and lands of Utherogill were affected with the restraining clauses of a strict entail. The question was, whether evidence was admissible to prove that the barony of Monimail was the barony of Melville under another name. If not, there were no lands mentioned in the dispositive clause to which the fetters of the entail could be made applicable. Lord Neaves held that evidence was admissible. "Clauses prohibitory, irritant, and resolu-

[1] *Dalyell* v. *Dalyell*, 17 Jan. 1810, F.C.

[2] *Steele* v. *Couper*, 15 Feb. 1853, 15 D. 385, 386, per Lord Cuninghame. See *Pitcairn*, 1710. M. 15,590; *Dillon* v. *Campbell*, 1780, M. 15,432.

[3] 23 and 24 Vict. cap. 143, § 11.

[4] See the opinions of the Judges in the case of *Chisholm* v. *Chisholm-Batten*, and authorities there referred to.

[5] *Stirling* v. *Dunn*, 21 Dec. 1827, 6 Sh. 272; *Stewart* v. *Nicolson*, *infra*.

[6] *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 72; *Howden* (*Rocheid's Tr.*) v. *Rocheid*, July 16, 1869, 7 M. (H.L.) 110, affirming 6 Macph. 300.

[7] *Earl of Leven and Melville* v. *Cartwright*, 12 June 1861, 23 D. 1038.

tive," he observed, "may always be made clear and intelligible in themselves, and ought not to bear reference to any other deed or document than the deed of entail. But a description of lands in a deed does not in itself designate the thing intended. Before it can be practically carried out, it is necessary to inquire what subjects *in rerum natura* correspond to the name and description given, and that inquiry can only be conducted by a reference to extrinsic evidence, such as must be resorted to in all questions of identification. . . . . Such a mode of inquiry may be necessary and competent, not only as regards the application of a general leading description in a dispositive or entailing clause, but also as regards certain qualifying or restrictive clauses."[1] In reviewing the Lord Ordinary's judgment the Court came to be of opinion that the objection was excluded by the terms of a former judgment, which was *res judicata* between the parties; accordingly, in the ultimate decision no opinion was given on this point. The admissibility of extrinsic evidence, directed to the identification of the subject of an entail, is evidently governed by the ordinary rules applicable to this kind of evidence.[2]

Personal right to lands a sufficient title to execute an entail.

870. The only title requisite on the part of an entailer is the possession of a proper real or personal right to the estate or subject of disposition. The title of apparency is not sufficient; but it is sufficient that the entailer is in a position to give the disponee the means of taking infeftment under the conditions of the entail, through the medium of an assignation of writs. This point is settled by an early case, *Napier* v. *Livingstone*, where, according to Lord Monboddo's report, "it was decided unanimously, *dissent. tantum Kames*, that a man having only a personal right to lands may, nevertheless, make an entail in terms of the Act 1685, and upon searching the records it was found that a great number of estates, and those the greatest of the kingdom, had been entailed in that way."[3]

Procuratory of resignation by proprietor possessing on a personal title, a good entail.

871. In the leading case of *Renton* v. *Anstruther*, where a proprietor possessing on a personal title made an entail in the form of a procuratory of resignation, containing the usual clause of assignation to writs, the question was whether the engrossment of prohibitions and fetters in a simple procuratory of resignation (without any substantive disposition) was sufficient to subject the estate to the conditions of the entail, seeing that a title by resignation would be completed not upon the procuratory containing the conditions, but upon the unexecuted procuratory in the title of the

[1] 23 D. 1051.

[2] See Chapter XX. (Extrinsic Evidence).

[3] *Napier* v. *Livingstone*, 1762, 5 Br. Sup. 888.

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entailer. The case having been appealed, was remitted by the House of Lords, and ultimately judgment was given, in conformity with the joint opinion of all the Judges, in favour of the validity of the entail.[1]

Radical right a sufficient title to execute an entail.

872. A trust-disposition of heritable estate for payment of debts, or economical management with an ultimate purpose of retrocession, express or implied, does not divest the granter, but is merely a burden upon his estate.[2] The truster's radical right is a sufficient title to execute an entail of the reversionary estate, and this title subsists even where an attempt has been made by an informal conveyance to divest the trustee.[3]

Entail need not enter the progress of titles.

873. It is not necessary that the deed of entail should form part of the feudal progress of titles. A disposition granted by a proprietor infeft to a series of heirs, under the fetters of a strict entail, recorded in the Register of Tailzies, will be effectual to bind the estate, though it should not contain within itself the machinery necessary for obtaining infeftment; and by parity of reason, an entail by a proprietor possessing on a personal title without a clause of assignation to writs will be effectual when it is recorded in the Register of Tailzies. A title may be completed in the person of the institute or heir of provision by adjudication in implement, or by a voluntary conveyance from the heir-general. In neither case does the instrument which constitutes the warrant of infeftment require to enter the Register of Tailzies.

Statement of the cases.

874. These propositions were affirmed by the judgment of the House of Lords (in accordance with the collective opinions of all the Judges upon a remit from the House) in the case of the *Earl of Fife* v. *Duff*.[4] The opinion of the Court was characterised by Lord Wensleydale as "a most able, full, clear, and learned statement of the law of Scotland on this subject."[5] For the purposes of this book it will be sufficient to state the case, referring the reader to that opinion for the grounds of the judgment. The subject of the action was the entail of Carraldston, executed by Major Skene in 1721, who at the time of the execution of the deed was in the possession of the estate on a personal title. The deed of entail was in favour of the entailer himself and certain heirs-substitute;

[1] *Renton* v. *Anstruther*, 5 Dec. 1837, 16 Sh. 184; remitted 1 March 1842, 1 Bell, 129; opinions reported 6 D. 230, and 2 Bell; affirmed 18 Aug. 1843, 2 Bell, 214; *Fogo* v. *Fogo*, 25 Feb. 1840, 2 D. 651; affirmed 18 Aug. 1843, 2 Bell, 195.

[2] *Campbell* v. *Edderline's Crs.*, 1801, M. "Adjudication," App. No. 11.

[3] *M'Millan* v. *Campbell*, 14 August 1834, 7 W. & S. 441, affirming 9 Sh. 551. See this and other cases in this branch of the law stated *infra*, Chapter LIV.

[4] *Earl of Fife* v. *Duff*, 2 March 1861, 23 D. 657; remitted 19 July 1861, advised 20 March 1862, 24 D. 936; judgment affirmed 27 March 1863, 4 Macq. 469.

[5] 4 Macq. 492.

it contained an assignation of writs, but no procuratory or precept. By the disposition on which he stood possessed of the estate, the entailer became the assignee of an unexecuted procuratory of resignation, by executing which he might at any time have feudalised the disposition in the deed of entail. He did not do so; on the contrary, in the year 1723, he exhausted the procuratory in question by expeding a charter of resignation of the lands and barony of Carraldston, upon which he took infeftment, and then made up a feudal title by infeftment in favour of himself and his heirs whatsoever. In the charter of resignation no notice was taken of the previously executed deed of entail. In an action raised in 1725, after the death of Major Skene, it was contended that by this proceeding the entailer intended to exercise the power of revocation contained in the deed of entail, but the contrary was decided by the Court of Session,—a decision which implied that the entail was still operative as a disposition of the personal fee. The first substitute (who was one of the entailer's heirs-portioners in general) then caused the entail to be recorded in the Register of Tailzies, and made up a title under it, by general service as heir of tailzie and provision, and infeftment upon a conveyance by the heir in implement of the settlement. In the proceedings in Court it was contended that the alleged entail was a mere obligation and not a substantive deed of entail, and that the Act of 1685, by requiring the insertion of the restraining clauses in the procuratories of resignation and precepts of sasine, in effect provided that there could be no entail without the means of taking infeftment by procuratory or precept. The Act, however, does not say that a procuratory or precept must be contained in the deed to render it valid, but only that the restraining clauses must be inserted in the procuratories and precepts upon which the title is made up. It was further maintained that the disposition in implement was the real entail, and that it ought to have been recorded as such. These pleas were negatived, and judgment was given in favour of the validity of the entail constituted by the deed of 1721.[1]

Apparent heir has not the power of creating a perfect entail.

875. An apparent heir cannot effectually entail the lands which he possesses on apparency, for this amongst other reasons, that the institute or heir, if heir *alioqui successurus*, would at common law be entitled to pass over the entailer, and obtain himself served heir to the ancestor last infeft. His title in that case would not be derived from the entailer, and he would not be bound by the con-

[1] In consequence of an inquiry from the Bench as to the mode of constitution of entails in early practice, an examination was made of the Register of Tailzies from 1685 to 1800, and the result was stated in a classified report, an abstract of which will be found in a note to the report of the case in 24 D. 940.

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ditions of a grant which he had not accepted.[1] But on the principle of approbate and reprobate, an institute may be bound to execute a strict entail of lands attempted to be entailed by an heir-apparent, if the ineffectual entail is part of a regular settlement by which other lands are effectually entailed on the same series of heirs.[2] It is a different question whether an entailer can, on the principle of *legatum rei alienæ*, compel the institute to entail lands to which the institute may have succeeded from a different author. The cases that have occurred are not favourable to the assertion of such a right on the part of entailers.[3] The distinction is clearly drawn in the opinion of the Court in the case of *Arbuthnot*.[4] "Were a person," it is said, "to entail his estate, and in the same deed to include an estate belonging to another, the entail would be void in so far as it related to the estate which did not belong to the granter; but there was no reason why that deed should not have effect in so far as it related to that estate over which the granter had the entire disposal."[5]

Obligation in marriage-contract not defeasible by entail.

876. It is, of course, essential to the validity of an entail that the maker should be free to dispose of the estate under its conditions and restrictions. If, therefore, a proprietor is under obligation by contract of marriage or other obligatory deed to settle his estate on a series of heirs unconditionally, he will not be allowed to adject to the conveyance the restraining clauses of a strict entail.[6] After various decisions, dealing with questions of this description on equitable considerations, the rule was finally laid down as here stated.[7] Where the maker of an entail reserves to himself in his marriage-contract the power of entailing the estate settled upon the heirs of the marriage, the power must be exercised precisely in terms of the reservation.[8] A reservation in general terms

[1] *Marquis of Clydesdale* v. *Earl of Dundonald*, 1726, M. 1275. If the institute were not heir to the person last infeft, could he adjudge the estate from the heir of that person, on the ground that the latter was liable under the Act 1695 for the debts and deeds of the apparent heir? It would seem that the Statute in question is only applicable to the enforcement of onerous deeds.

[2] *Carmichael* v. *Carmichael*, 15 Nov. 1810, F.C.; affirmed 15 May 1816, 6 Pat. 155; *Murray* v. *Ramsay*, 17 Jan. 1811, F.C.

[3] *Stirlings* v. *Stirling*, 1801, M. 15,455; *Stewart* v. *Leslie*, 10 March 1810, stated in Sandford on Entails, pp. 191-193.

[4] *Arbuthnot* v. *Arbuthnot*, 1792, Bell, Oct. Ca. 161.

[5] *Ibid.* p. 165.

[6] *Gordon* v. *Gordon*, 1731, M. 12,984; *Ker* v. *Ker*, 1747, M. 12,987; *Strang* v. *Strang*, 1751, M. 12,988; *Munro* v. *Munro*, *infra*.

[7] *Munro* v. *Munro*, 13 Feb. 1810, F.C. See also *Speirs* v. *Dunlop*, 1778, M. 13,026; *Watson* v. *Pyot*, 1801, M. "Provisions to Heirs and Children," App. No. 4; *Urquhart* v. *Urquhart*, 13 D. 742, 14 July 1853, 1 Macq. 658. Nor is it competent, by a subsequent deed, to alter the destination of a marriage-contract settlement; *Haig* v. *Haig*, 14 Feb. 1857, 19 D. 449.

[8] *Macneil* v. *Macneil's Trs.*, 27 Jan. 1826, 4 Sh. 393, N.E. 396; *Macleod* v. *Macleod*, 1 July 1828, 6 Sh. 1043.

is an authority to execute a strict entail with such conditions as are usual and reasonable.[1]

Effect of including entailed and unentailed lands in same conveyance.

877. It is quite competent and not unusual to include entailed and unentailed lands in one and the same conveyance. The case of the *Earl of Leven and Melville* v. *Cartwright*, already noticed, is an example.[2] In such cases the extent of the entail is determined by the restraining clauses. An entail cannot be raised by implication; and therefore, when an heir of entail acquired the *dominium utile* of lands, the superiority of which was included in the entailed estate, and afterwards resigned *ad remanentiam* in his own hands as superior, it was held that the *dominium utile* was not thereby brought under the fetters of the entail.[3] It need scarcely be added that an entail of the *dominium utile* cannot be extinguished by consolidating that estate with a superiority held in fee-simple; for, as was observed by Lord Monboddo,[4] if that were admitted, an easy way would be found of getting free of all entails of lands held of subjects-superior, namely, by purchasing the superiority, and then consolidating the two estates by resignation *ad remanentiam*. Where however a proprietor, vest in the superiority and *dominium utile* of the same property, possesses on the title of superiority for forty years, it is held that the estates become consolidated by prescription (the base fee being extinguished by possession on the title of superiority), even when the effect of consolidation is to bring the *dominium utile* under the fetters of a strict entail.[5] Whether the converse of this proposition would hold good, and an entail of a base fee would be worked off by prescriptive possession of the superiority, is a question still undecided, but we do not see how it is possible to resist the application of the principle of *Lord Elibank's* case in the case supposed.

SECTION II.

What constitutes a Tailzied Destination.

Object of tailzied destination.

878. The object of every settlement in strict entail is to perpetuate or continue the succession to a particular estate in a certain order of succession prescribed by the entailer, and, as incidental

[1] Sandford on Entails, 199.

[2] *Earl of Leven and Melville* v. *Cartwright*, 12 June 1861, 23 D. 1038; see the Lord Ordinary's note, p. 1050.

[3] *Heron* v. *Duke of Queensberry and Dover*, 1733, 1 Cr. St. & Pat. 98; *Galbraith* v. *Graham*, 14 Jan. 1814, F.C. See also *Duke of Roxburghe* v. *Wauchope*, 9 March 1825, 1 W. & S. 41.

[4] 5 Br. Sup. 886, *Lord Napier* v. *Livingstone*.

[5] *Lord Elibank* v. *Campbell*, 21 Nov. 1833, 12 Sh. 74; *Graham* v. *Bontine*, 6 Aug. 1840, 1 Rob. 346; *Wilson* v *Pollock*, 29 Nov. 1839, 2 D. 159.

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to this object, to deprive the disponees and heirs of entail of the power of alienating the estate, or subjecting it to the diligence of their creditors.

Whether entail effectual at common law prior to the Statute.

879. Whether at common law a proprietor could make a strict entail of his estate, is a question which has very frequently been discussed, without ever having been precisely determined.[1] It is agreed by all writers that, after the passing of the Entail Act, 1685, cap. 22, settlements in strict entail could only be made in the form and under the conditions prescribed by the Statute.[2] On the other hand, it is generally admitted that the notion of an entail, as a continuing succession in a selected line of inheritance, is derived from the common law of succession.[3] The Statute prescribes certain formalities in the nature of conditions upon which it is made lawful to the subjects of the Crown "to tailzie their lands and estates, and to substitute heirs in their tailzies,

[1] It appears from Hope's Minor Practicks, p. 402, that, in the opinion of the profession in the time of that author, a simple destination was not binding upon the heirs succeeding under it, and that it could not be made effectual by inhibition, but that a clause *de non alienando* might be enforced by that diligence or by an action of reduction. In *Chapman* v. *Bryson*, 1759, 5 Br. Sup. 940, it was found that an entail containing prohibitions, but defective in the irritant and resolutive clauses, could not be enforced by inhibition, the President being of opinion "that this was a way of making an entail not agreeable either to the Statute 1685 or the common law; not to the Statute, because it was not recorded; nor to the common law, because it did not irritate the right of the contravener, which the constitution of our feudal rights requires." In the case of *Stormonth* v. *Annandale's Crs.*, 1662, M. 13,994, the Court sustained an entail made before the date of the entail Statute, containing prohibitory, irritant, and resolutive clauses; while in *Sharp* v. *Sharp*, 1631, M. 4299, a contract to execute mutual deeds of entail was held to be no bar to selling. In *Craig* v. *Craig* (Riccarton), M. 15,494, an entail antecedent to the Statute was found to be ineffectual in a question with creditors, by reason of the want of a proper resolutive clause. This judgment was reversed on appeal (1713, Robertson, 110), but upon what ground does not appear. Finally, in the case of *Earl of Rothes* v. *Philip*, 1761, 2 Pat. 52, the question was practically set at rest by the declaration of the House of Lords, "That entails created of lands in Scotland, with prohibitive, irritant, and resolutive clauses, before the making of the Act of Parliament concerning Tailzies in 1685, ought to be recorded in the Register of Tailzies according to the said Statute." As to the efficacy at common law of entails containing prohibitions intended only to bind the heirs, see note 3, *infra*; also § 880, note 1.

[2] Stat. 1685, cap. 22.

[3] In delivering judgment in the case of *Carrick* v. *Buchanan*, 5 Sept. 1844, 3 Bell, 342, Lords Brougham and Campbell expressed a very distinct opinion that entails containing prohibitions, but without irritant and resolutive clauses, derive their efficacy from the common law, and that such entails are binding on the heirs of the destination to the effect of restraining gratuitous alienations in contravention of the prescribed order of succession; see pp. 435 and 443. See also *Lindsey* v. *Oswald*, 2 Macph. 249; 21 March 1867, 5 Macph. (H.L.) 12, L.R. 1 Sc. Ap. 99. These opinions are in accordance with the views stated by the institutional writers, particularly Stair, 1, 14, 6, and 2, 3, 58; Ersk. 3, 8, 23; Mackenzie, 3, 8; also vol. ii. p. 487; Kames, Elucidations, art. 42 (pp. 345-6 of ed. 1777).

with such provisions and conditions as they shall think fit." It is for the law of succession to determine what is comprehended in the general idea or notion of an entail, or, in other words, what description of settlements are protected by the operation of the Statute of 1685.

Same rules of interpretation applied to entails and to simple destinations.

880. The construction of heritable destinations is the subject of special consideration in a subsequent chapter. In what relates to the construction of destinations properly so called, *i.e.*, the interpretation of terms designative of persons and property, relationship and order of succession, there is no material difference between deeds of entail and deeds of simple destination. If a proprietor executes a settlement of lands under the conditions of a strict entail, reserving power to revoke, and thereafter by a separate deed revokes the fetters of the entail, leaving the destination intact, the construction of the subsisting part of the settlement will be the same as it was before the act of revocation; only the estate will be disentailed, and will be subject to the debts and deeds of the disponee and heirs of provision.[1]

Requisites of an effectual tailzied destination.

881. In order to the constitution of an effectual tailzied succession,[2] it would appear that three requisites must concur: (1) the succession must be given to a selected order of heirs, not to heirs-at-law; (2) the order of succesion must be lineal, *i.e.*, without division; and (3) the heirs of provision must either be named in the settlement, or designed by words of proper designation denoting a recognised category of descent from persons named in the settlement.

Legal order of succession cannot be perpetuated by an entail.

882. (1.) It is not competent by means of a deed of entail to perpetuate the legal order of succession. The object of the Entail Statute was not to enable landed proprietors to protect their estates

[1] The doctrine here stated rests upon the best of all authority, which is, that no other than the ordinary rules of construction have ever been applied to the interpretation of destinations in deeds of entail. It was assumed, and by several of the Judges expressly stated, as the condition of the argument upon the construction of the destination to heirs whatsoever, in the two cases of *Macgregor* v. *Gordon*, 3 Macph. 148, and *Gordon* v. *Gordon's Trs.*, 4 Macph. 501. In the latter case, Lord Barcaple observed, "In construing the destination in an entail, there is no ground for adopting any peculiar or strict principle of construction. The question is simply as to the meaning of the entailer in the use of the words which he has employed, there being no room for the strict principle of construction applicable to the fettering clauses. Many cases have occurred in which a limited meaning has been put upon expressions in a destination describing the classes of heirs called. In particular, the expression 'heirs' or 'heirs whatsoever,' has been held to mean heirs-male whatsoever, or heirs whatsoever of the body. But the ground for adopting this limited sense of the words has been found in the context, or in the prior investiture."

[2] "Tailzied," *i.e.*, interrupted (from "*tailler*," to cut), because the legal order of succession is interrupted or cut off, and an arbitrary one substituted.

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against the debts and deeds of their heirs-at-law, but to enable them to institute a series of heirs different from that of the legal order of succession, and to transmit the estate securely in the conventional line of succession. "Simple infeftments," says Lord Stair, "are those which are taken to heirs whatsoever; for by that expression we express the lineal heirs who according to law would succeed in any heritable right; but tailzied infeftments are, where the lands are provided to any other than the heirs of line, as when it is provided to heirs-male, or heirs male of the fiar's own body. . . . Ordinarily, in them all, the last member or termination is to heirs whatsomever of the last branch or person substituted, or the disponer's heirs; and where that takes effect by succession, the fee, which before was tailzied, becomes simple." [1]

Destination to heirs whatsoever, including heirs-portioners, will not support an entail.

883. The doctrine thus explicitly laid down by our first institutional writer is confirmed by a series of decisions which establish that a nomination of "heirs whatsoever," whether of the entailer or of the last substitute in the destination, will not suffice to support an entail, and that the estate becomes a fee-simple in the person of the last substitute under the antecedent part of the destination.[2] Nor is the construction affected by the element of a declaration that the eldest heir-portioner shall succeed without division; for, as the heir whatsoever has the capacity of making up his title as heir of line, ignoring the deed of provision, the tailzied succession is necessarily exhausted, and the estate will descend to the heirs at-law of the person last seized in the estate as of fee.[3]

[1] Stair, 2, 3, 43.

[2] *Leslie* v. *Dick*, 1710, M. 15,358; *Earl of March* v. *Kennedy*, M. 15,412, 1760; 2 Pat. 49, the leading case; *Henry* v. *Watt*, 13 June 1832, 10 Sh. 644; *Colvill* v. *Colvill*, 8 March 1843, 5 D. 861; 25 April 1845, 4 Bell, 248. See also Stair, *ut supra*, and 4, 18, 8; Ersk. 3, 8, 32; Mackenzie, Inst. 3, 10, and Treatise on Tailzies, 4, 9, 1. It may be asked how it can be known that any individual is the last heir-substitute until after his death, seeing that, even on the supposition of his being the sole existing heir of the destination, there is always a possibility of his becoming the father of an heir. The case of the *Earl of March* is an express authority for the proposition that a last existing substitute may resettle the estate; but whether the new settlement be defeasible by the subsequent birth of an heir-substitute of the original settlement is another question, and one which, if ruled by the analogy of *Mackinnon's* case (as to which see Chapter XXX.), will fall to be answered in the affirmative. The suggestion that the son would have no title to challenge the alienation where the father would incur the forfeiture of the estate for himself and his descendants is not satisfactory, because in the case supposed there are no remoter substitutes in whose favour the forfeiture could take place. On this point see *Denham* v. *Maitland*, 1772, 5 Br. Sup. 623; *Russell* v. *Russell*, 1763, 5 Br. Sup. 895; and *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 73.

[3] See the cases of *Gordon* v. *Mosse*, 19 Dec. 1851, 14 D. 269; and *Steele* v. *Coupar*, 15 Feb. 1853, 15 D. 385, where the ultimate destination was to "heirs and assignees;" and *Primrose* v. *Primrose*, 9 Feb. 1854, 16 D. 498, where the destination was to "my ain nearest and lawful heirs whatsoever in fee, the eldest heir-female and the descendants of her body always excluding all other heirs-portioners, and succeeding without division."

The only consequence of the exclusion of heirs-portioners in the ultimate destination, as it would seem, is, that if the last of the proper substitutes does not evacuate the destination, and if, under the destination to heirs whatsoever, the succession should open to heirs-portioners, the eldest heir-portioner would take the estate as under a simple destination.[1]

Immediate destination to heirs-at-law held bad as an entail.

884. In the class of cases to which reference has been made, some weight was undoubtedly allowed to the consideration that the entailer, having completed his enumeration of the selected order of heirs, proceeded to call his heirs whatsoever either as a matter of form, or to show that the estate should not revert to the Crown, but to his heirs-at-law. Notwithstanding these cases, the question whether a proprietor might *ex proposito* entail his lands under a destination to an institute and his heirs whatsoever, or under some modification of that destination, was for a long time considered open to discussion. The question having eventually been the subject of three consecutive and all but unanimous judgments of the Court, may be regarded as finally settled.

Discussion of the cases. Effect of a direction to entail on "A. and his heirs."

885. In *Leny* v. *Leny*,[2] the question was raised upon a direction to trustees to purchase landed estate in Scotland, to be entailed in favour of the truster's nephew, "and his lawful heirs for ever." It was held that this was equivalent to a direction to make an entail in favour of the nephew and his heirs whatsoever; that such a destination could not be the subject of a strict entail; that the trustees were not entitled to insert a clause of preference in favour of the eldest heir-portioner; and consequently that the institute was entitled to acquire the estate in fee-simple. "We apprehend," say the Judges in the leading opinion, "there can be no reasonable doubt that, prior to the 'Act concerning Tailzies,' the word 'tailzie' meant an instrument of conveyance by which an estate was settled on a selected and specified series of heirs; and therefore, when the Parliament of Scotland, in 1685, 'statutes and declares, that it shall be lawful for His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies with such conditions and provisions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell,' &c., it seems impossible to give the term tailzie in the Statute any different or wider meaning than it had in the older law. 'To substitute heirs' certainly means to substitute one heir or class of heirs to another on a principle of selection and order, for substitution is a perfectly well defined *nomen juris*. 'To

[1] See the observations of Lords Cowan and Cockburn on this question, 16 D. 504.

[2] *Leny* v. *Leny*, 28 June 1860, 22 D. 1272 (whole Court).

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affect the said tailzies with irritant and resolutive clauses' can mean nothing else than to affect the succession of the heirs with such clauses. . . . Heirs of tailzie are all necessarily heirs—*hæredes facti*—of the entailer. They represent him, and take his estate in their order, subject to the conditions which he has appointed. But while one may have heirs of this description, *hæredes facti*, in an almost inexhaustible series, it is very different with a man's heir-at-law. He cannot, in any proper sense, have a series of such heirs. The person or persons, as the case may be, who on his death is or are entitled to take up his estate by service, and so transmit it from the dead to the living, is or are the only heir-at-law or heirs-at-law that he ever will or can have. When the estate has once been taken out of his *hæreditas jacens* by service and infeftment, the legal order of succession to him is exhausted by that one step of succession."[1]

Effect of a direction to entail on A. and his heirs, excluding heirs-portioners.

886. In the case of *Macgregor* v. *Gordon*,[2] the Court was called to consider the effect of an entail made in conformity with a direction in the trust-disposition of a landed proprietor—the destination being to the truster's natural son, "and his heirs whatsoever, the eldest heir-female, and the descendants of her body, excluding heirs-portioners, and succeeding always without division through the whole course of the female succession, whom failing, then to the heirs whatsoever of the truster." A majority of the whole Court (Lord Curriehill alone dissenting) were of opinion that the case was ruled by the judgment in *Leny* v. *Leny;* and that, for the reasons given in the case of *Primrose*,[3] the destination to heirs whatsoever of the institute was not converted into a tailzied destination, by reason of the preference of the eldest heir-female and her descendants to heirs-portioners. Lord Curriehill's opinion proceeded on the assumption that a nomination of "heirs whatsoever," when occurring in what purports to be a proper tailzied destination, is to be construed as a nomination, not of the legal order of heirs, but of the persons who, at each time the succession opens, stand in the relation of heirs-general to the *propositus*, or, as the proposition was put by his Lordship in the subsequent case of *Gordon* v. *Gordon's Trustees*, that it is equivalent to a destination to heirs-female after heirs-male. It is obvious that the series of persons who might successively be entitled to serve as heirs-general of the *propositus*, may come to be very different from the legal

[1] 22 D. 1288.

[2] *Macgregor* v. *Gordon*, 1 Dec. 1864, 3 Macph. 148. The case was tried in the form of a suspension of a threatened charge by a purchaser—a previous action of declarator at the instance of the institute having failed for want of interest in the parties called as defenders; see 24 D. 687.

[3] *Primrose* v. *Primrose*, 9 Feb. 1854, 16 D. 498.

order of succession, where the first heir-general serves to the *propositus* and is succeeded by his heir, and so on. According to the construction suggested by Lord Curriehill, the succession would, in the first place, follow the line of the heirs of the body; and if, for example, an eldest son should succeed, and should die without issue, the succession would devolve to his brother by the half-blood, to the exclusion of his sister by the full-blood—the former being the nearest heir-general of the *propositus*, or person from whom the descent is traced; the latter being the heir-at-law of the heir last vest in the estate. According to the same construction, the succession could never pass through a father to his sons by a different marriage. But this only proves, what is known to every one conversant with heritable succession, that a destination to heirs-general of the body, with subsequent limitations to heirs of the collateral branches, is a very different thing from the legal order of succession.[1] It does not prove that the expression "heirs whatsoever" means heirs of the body, with subsequent limitations. Notwithstanding the acknowledged learning of the Judge by whom it was propounded, we must regard the proposed construction of "heirs whatsoever" as somewhat fanciful. The opinion has no support from authority, and in no way detracts from the weight due to the judgment of the Court, according to which the term "heirs whatsoever" in a deed of entail is to receive its ordinary signification, in whatever part of the deed it occurs.[2]

Ultimate gift to heirs effective only as a simple destination.

887. It is to be observed, in the case of an ultimate destination to the entailer's heirs whatsoever, that although such a destination may be altered by the immediately preceding heir-substitute, yet, if that heir should be unable (*e.g.*, from mental incapacity or nonage) to execute a deed of alteration, the clause of return will be good as a simple destination; and the estate will go to the entailer's heir, and not to the heir of the last substitute.

Destination limited to persons of the blood of the entailer sufficient to support an entail.

888. The case of *Collow's Trustees* v. *Connell*[3] settles a principle of importance in the law of entailed destination. The final destination in question was of an exceptional character, being conceived in favour of the entailer's "own nearest of kindred." The last substitute under the previous branches of the destination left

[1] See this explained in *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 72-79 (Lord Handyside's note).

[2] The third decision to which we referred belongs properly to the subject of trusts for the execution of entails. By it the whole Court determined that a trust to execute an entail in favour of A. and his heirs whatsoever; whom failing, to B. and his heirs whatsoever, excluding heirs-portioners; whom failing, to the truster's heirs and assignees,—did not entitle the trustees to limit the estate to the heirs of the body of the parties named, with the view of constituting an effectual entail; *Gordon* v. *Gordon's Trs.*, 2 March 1866, 4 Macph. 501.

[3] *Collow's Trs.* v. *Connell*, 23 Feb. 1866, 4 Macph. 465.

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a general trust-disposition and settlement of his heritable and moveable estate, and the question was whether it carried the estate which was the subject of the entail. Lord Kinloch held that it did not, as a question of intention; but the Court, while agreeing in the result (that the estate was not carried by the trust-settlement), did so on the ground that the destination to "nearest of kindred" was a good tailzied destination, because, *whatever might be its meaning*, it was limited to relations of the blood of the testator. Their Lordships were further of opinion that, in the case of a plurality of persons succeeding at the same time under such a destination, they would, like heirs-portioners, be entitled to be served heirs of provision.[1] The principle which we conceive to be involved in this decision is, that *any* destination limited to the blood of the entailer is sufficient to support an entail; from which it would seem to follow that a destination to heirs-general, excluding those who were not of the blood of the entailer, is a good tailzied destination,—a conclusion which is not inconsistent with the principle of the decision in *Macgregor* v. *Gordon*.

Succession under an entail must be without division.

889. (2.) The next proposition is, that the succession under a strict entail must be lineal, or without division. This is established by the cases in which it has been held that an entail is broken as soon as the succession opens to heirs-portioners.[2] To prevent this result, it is usual to declare, in the destination of the deed of entail, that the eldest heir-female and her descendants shall exclude heirs-portioners throughout the course of the succession. Although a provision of this kind cannot be raised by implication in an entail executed, it is regarded as so much a matter of style, that trustees for the execution of entails have been held entitled to exclude heirs-portioners in entails executed under their powers, where the truster had prescribed a proper tailzied destination, and had given directions for the execution of a deed of strict entail.[3]

Entail subsists until succession actually opens to heirs-portioners.

890. It is to be observed that, even in the case of heirs-portioners not being excluded by the terms of the deed of entail, the heir-substitute taking immediately before the succession opens to heirs-portioners would not take an estate in fee-simple. On the contrary, the heirs-portioners would succeed as heirs of provision,

[1] 4 Macph. 470, per Lord Colonsay. But see the sequel of this case, where it was held that the expression applied to a single heir; 14 Feb. 1867 (*nom. Connell* v. *Grierson*), 5 Macph. 379.

[2] *Macdonald* v. *Lockhart*, 22 Dec. 1842, 5 D. 372; *Farquhar* v. *Farquhar*, 28 Nov. 1838, 1 D. 121; *Hunter* v. *Kellie*, 11 Dec. 1834, 13 Sh. 185; *dicta* in *Earl of March* v. *Kennedy*, 1760, M. 15,412. See also *Collow's Trs.* v. *Connell*, and other cases cited in last paragraph.

[3] *Sprot* v. *Sprot*, 22 May 1828, 6 Sh. 833; *Forrest's Trs.* v. *Forrest*, 14 Dec. 1845, 8 D. 304; *Martin* v. *Kelso*, 19 July 1853, 15 D. 950; 21 March 1857, 2 Macq. 556; *Sands* v. *Sands*, 16 Jan. 1844, 6 D. 365.

whether they were or were not the heirs-general of the heir last in possession. Indeed it cannot be known, until the actual opening of the succession to heirs-portioners, that there will be a plurality of persons entitled to succeed under the destination.[1]

Whether entailer may provide for female succession by giving separate entailed estates to the heirs-portioners.

891. An entailer may provide specially for the contingency of the succession devolving to heirs-portioners then in being, by dividing the succession, and giving separate estates to these persons by name. In this case, according to the judgment of the House of Lords in *Mure* v. *Mure*,[2] the succession would then devolve to the successors of these heirs, as if under distinct entails. However, in the subsequent case of *Sands* v. *Sands*,[3] where, in certain events, the succession to an entailed estate was divided between the entailer's sisters in equal shares, the Court held that the succession vested in the ladies in fee-simple.

Tailzied succession must be based on relationship.

892. (3.) It may be asserted as a general proposition that the only kind of destination capable of supporting an entail is one to a series of persons named, with or without substitutions to heirs of a determinate class,—that is to say, to persons standing in a known order of relationship different from the legal order of succession, but constituting a recognisable group of heirs. Such are heirs-male, heirs-male of the body, heirs-general of the body, heirs-female, &c. In *Macgillivray* v. *Souter*,[4] it was attempted to support a limitation of heritable estate to heirs belonging to a particular clan, called the Clan Chattan; but this was held to be too indefinite and intangible a limitation to form the basis of a title. Indeed, the Court seem to have experienced considerable difficulty in apprehending the notion of a clan. Lord Ardmillan, as Ordinary, proposed to make a remit for the purpose of ascertaining, "1*st*, What is a clan; and are there now any clans? 2*d*, Is there a clan known and described as the Clan Chattan; and if so, of what does it consist? Is clanship, or membership of a clan, understood to be transmitted exclusively through males?" The Lord President M'Neill thought that clanship was "a very evanescent matter altogether;" and that a party claiming to exclude the heir-at-law "must be able to found on something plain and tangible, and known to the law." The other Judges expressed their opinions to the like effect.[5]

[1] Per the Lord President (Lord Colonsay) in *Collow's Trs.* v. *Connell*, 23 Feb. 1866, 4 Macph. 470, citing the cases of *Mure* and *Farquhar*, *supra*.

[2] *Mure* v. *Mure*, 16 Feb. 1837, 15 Sh. 581; 18 May 1838, 3 S. & M'L. 237. See the sequel of this case, *Craig* v. *M'Culloch*, 21 Feb. 1839, 1 D. 545.

[3] *Sands* v. *Sands*, 16 Jan. 1844, 6 D. 395.

[4] *Macgillivray* v. *Souter*, 12 March 1862, 24 D. 759.

[5] 24 D. 767 *et seq.* The writer is not to be understood as throwing doubt on the power of an entailer to exclude particular heirs from the succession, or to impose

SECTION III.

Of Imperfect Entails (Omitted Prohibition: Omission of Words binding the Institute).

Introductory.

893. Imperfect entails—that is, entails defective in the prohibitory, irritant, or resolutive clauses, or in the other statutory requisites—have been productive of more litigation than any other class of rights connected with heritable succession. The decisions in the *Ascog* and *Tillicoultry* cases, in 1830, presented an inducement to the discovery of flaws in the restraining clauses of family settlements, which was greatly strengthened by the provisions of the Entail Amendment Act of 1848, whereby entails defective in regard to any of the statutory prohibitions are declared to be invalid and ineffectual as regards all the prohibitions; and the estate is made subject to the deeds and debts of the heir in possession.[1] A large body of decisions has, in consequence, been accumulated during the last thirty years respecting the construction of the restraining clauses of entails, the persons upon whom they are binding, and the consequences, in relation to the rights of the disponees and their creditors, of defects in the structure of such clauses.

Limits of the subject.

894. The present section may be regarded as introductory to the discussion of the more technical branches of the law of entail which form the subject of the next chapter, *i.e.*, the construction of the restraining clauses of entails, and the other requisites of the Statute 1685, cap. 22. Though the subject of imperfect entails is

conditions, such as that the heir succeeding to the estate is, or is not, to be the heir succeeding to a certain other estate, or to a title, &c. But the basis of the destination must be relationship. The condition of clanship is referred to as a case which probably comes as near to relationship as any other basis of destination which can be figured.

[1] 11 and 12 Vict., cap. 36, § 43. That where any tailzie "shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament passed in the year one thousand six hundred and eighty-five, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail, or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such Tailzie shall be deemed and taken from and after the passing of this Act to be invalid and ineffectual as regards all the prohibitions; and the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie; and no action of forfeiture shall be competent at the instance of any heir-substitute in such tailzie against the heir in possession under the same, by reason of any contravention of all or any of the prohibitions." Trust money or lands directed to be entailed are to be dealt with under this section as if the entail had been executed in terms of the truster's direction. It has been held by the Court, and eventually by the House of Lords, that an entail in which the prohibition against

no longer of practical importance,[1] it is intimately connected with that of the interpretation of the restraining clauses of entails, and for this reason, as well as on the ground of its historical importance, we feel warranted in submitting to the reader a somewhat extended exposition of the law of imperfect entails.

Principle of the Entail Act, 1685.

895. I. ENTAILS DEFECTIVE BY REASON OF THE OMISSION OF CERTAIN OF THE STATUTORY PROHIBITIONS.—The principle of the "Act concerning Tailzies"[2] is the authorising the insertion in deeds of settlement of series of clauses, designed for the purposes of preserving the succession to the heirs of the destination, and of protecting the estate against alienation and execution for debt. In order that an entail may be effectual against creditors and gratuitous disponees, the destination must be protected by prohibitions directed against the institute and the heirs of entail, and made distinctly applicable to the three kinds of contravention contemplated in the Statute, namely,—alienation, contraction of debt, and alteration of the order of succession. The prohibitions must also be "fenced" or guarded by proper irritant and resolutive clauses; the first annulling acts in contravention of the prohibitions; the second forfeiting the right of the contravener (usually for himself and his descendants), and devolving the succession to the next substitute in the destination.[3]

altering the succession is unfenced, falls within the scope of the enactment; but in none of the cases does the question appear to have been fully discussed. The cases are *Cunyngham* v. *Cunyngham*, 9 March 1852, 14 D. 636; *Dewar* v. *Dewar*, 20 July 1852, 14 D. 1062; *Ferguson* v. *Ferguson*, 18 Nov. 1852, 15 D. 19; *Scott* v. *Scott*, 18 D. 168; *Lord Rollo* v. *Rollo*, 24 Nov. 1864, 3 Macph. 78; and *Hamilton* v. *Duke of Hamilton*, 1870, 8 Macph. (H.L.) 48.

[1] *I.e.*, in consequence of the above-mentioned provision of the Entail Amendment Act, 1848, see *Dempster* v. *Dempster*, 3 Macq. 62. It must be remembered that although prohibitory, irritant, and resolutive clauses are things of the past, the rights which have arisen under them are of the present. Upon their validity depend the expectations of succession of innumerable heirs-substitute in those cases where the heir in possession is not in a position to obtain the requisite consents to a disentail. As to the abolition of those clauses in modern entails see the note at the beginning of the next section.

[2] 1685, cap. 22. The leading enactment is as follows:—"That it shall be lawful to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprised, adjudged, or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void; and that the next heir of tailzie may, immediately upon contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee and did not contraveen, without necessity any ways to represent the contraveener."

[3] The Statute merely declares the principle upon which an entail may be constructed; it does not profess to prescribe the form of the clauses prohibitory, irritant, and resolutive. On such questions, as well as on the effect of deviations from

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On the construction of the Act 1685 imperfect entails were held effectual according to their tenor.

896. To ensure the transmission of the estate to heirs of the destination undiminished and unburdened, the restraining clauses must be perfect. But upon considerations founded in part on the common law and partly on the theory of the Statute, the doctrine was established that the statutory prohibitions, when duly fenced with irritant and resolutive clauses, ought to receive effect according to their tenor; and, consequently, that an entail defective in any of the prohibitions could only be defeated by doing the thing that was not effectually prohibited. This, at all events, was the law with respect to the clauses applicable to alienation and contraction of debt. Where, for example, the entail was defective in any of the restraining clauses applicable to alienation, the heir in possession was entitled to sell the estate or dispose of it for onerous causes in his lifetime; but he could not burden the estate with debt, or alter the order of succession to it, because in so doing he incurred an irritancy which would carry the estate to the next substitute. If the defect were in the clauses applicable to the contraction of debt, the estate was subject to voluntary disposition in security and to adjudication, but it could not be sold or re-settled.[1]

the statutory requirements, the decisions of the Courts are the only guide. "It does not appear to me," said Lord Chancellor Cottenham, in the case of the *Overton* entail, "that any great assistance can be derived from reference to the terms of the Statute, for that merely describes the general rule, that in settlements to be made in pursuance of the Statute there shall be clauses irritant and resolutive, which shall have the effect, among other things, of preventing any acts from being done whereby the succession shall be altered. . . . The question as to what clauses shall have that effect, is to be arrived at from a consideration of the decisions, rather than from the terms of the Statute." Lord Brougham remarked, "If we go to the Statute, and endeavour to shape our course by any opinion to be deduced from it, we shall find that we are wholly at sea, that we have no compass or guide, and that we must resort to the law as expounded by the decisions, the Statute itself affording no decisive rule one way or other in the great majority of cases which occur;" *Lang* v. *Lang*, 16 Aug. 1839, M'L. & Rob. 884, 890.

[1] The case of the *Carleton* entail (*Cathcart* v. *Cathcart*, 18 July 1831, 5 W. & S. 315) may be taken to have settled the point that an heir could not take advantage of a flaw in the restraining clauses applicable to contraction of debt, so as either directly, or by adjudication upon fictitious bill transactions, to alienate or re-settle the estate. But it was long considered an open question whether creditors might not take advantage of defects in the clauses applicable to alienation. In one view, it was contended, a creditor was entitled to adjudge the estate, on the ground that, being subject to the voluntary acts of the heir, it was substantially an estate in fee-simple, or at least he was entitled to adjudge the heir's power of disposal for the purpose of executing a disposition in favour of himself. This question was only formally decided in the negative in 1850 (after the law had been altered by the Entail Amendment Act); though it appears from the opinions delivered in the Court of Session, and on appeal in the case referred to (*Cochrane* v. *Bogle*, 25 March 1850, 7 Bell, 65, affirming 11 D. 908), that the doctrine had long been recognised that an entail could only be defeated by doing the precise thing that was not effectually prohibited. The authorities relied on, besides the case of *Cathcart* already cited, were *Lord Duffus' Trs.* v. *Dunbar*, 28 Jan. 1842, 4 D. 523;

Prohibition to alter succession effectual as a condition of the grant without irritant or resolutive clauses.

897. The clauses intended to prevent the alteration of the order of succession come under the operation of a different principle. On the one hand, it was settled that prohibitions directed against altering the succession were binding *inter hæredes*, as conditions of the grant. An heir-substitute who had made up a title under an entail could not alter the succession without violating the condition on which he took the estate. If he attempted to alter it, the deed of alteration might be set aside at the instance of any of the heirs-substitute; and an action would be maintainable against the heir under the new settlement, who, as the gratuitous disponee and representative of the contravener, was held to be liable in fulfilment of his obligations. Irritant and resolutive clauses were therefore not necessary for the protection of the rights of the heirs-substitute, in a question with heirs claiming to succeed under a deed of alteration of the succession.[1]

No entail possible without a prohibition against altering the succession.

898. On the other hand, without a *prohibition* directed against altering the order of succession, there could be no entail for any purpose; and for this reason, that as far as the right of the heirs-substitute was concerned, the settlement was no better than a deed of simple destination. Their right was defeasible at the pleasure of the heir in possession; he could at any moment acquire the estate in fee-simple by executing a disposition to himself and heirs whatsoever; the heirs-substitutes had therefore no such vested interest in the estate as would entitle them to challenge deeds of alienation

Cochrane v. *Vernor*, 21 Feb. 1844, 6 D. 723; *Dewar* v. *Burden*, 26 Nov. 1845, 8 D. 91; 25 March 1850, 7 Bell, 32; and *Lindsay* v. *Earl of Aboyne*, 2 March 1842, 4 D. 843; 5 Sept. 1844, 3 Bell, 254.

[1] Stair, 2, 3, 58, 3d paragraph; Ersk. 3, 8, 23; Mackenzie, 3, 8; Kames, Elucidations, art. 42, pp. 345-6; *Earl of Callander* v. *Lord John Hamilton*, 1687, M. 15,476; *Ure* v. *Earl of Cravfurd*, 17[illegible]6, M. 4315. After the decisions in the *Ascog* and *Tillicoultry* cases, cited *infra*, § 900, an attempt was made, in the case of *Cathcart*, to controvert the doctrine that entails with prohibitions were binding *inter hæredes*, an attempt which called forth a strong protest from Lord Brougham. The doctrine that an entail ineffectual against creditors was invalid in a question with heirs, was, in the language of that high authority, "strange, and pregnant with peril, and founded on a most fanciful construction of the Act of 1685." "The ground on which the *Ascog* case was ultimately determined," he continues, "does not break in upon that which I have taken the liberty of stating, that the course and current of the authorities is destructive of the proposition, that if an entail is bad as against singular successors it is bad *intra familiam*." The true doctrine, according to Lord Brougham, is laid down by Lord Kilkerran in *Guirdner* v. *Primrose*, 1744, M. 15,501-15,503, that a simple prohibition bars gratuitous deeds or debts from affecting the estate, but that onerous deeds and debts are no otherwise barred than by clauses irritant of the debts and resolutive of the granter's rights; *Cathcart* v. *Cathcart*, 18 July 1831, 5 W. & S. 315, see pp. 344-346. The point was finally set at rest by the judgment of the House of Lords, proceeding on the all but unanimous opinion of the whole Court in *Carrick* v. *Buchanan*, 5 Sept. 1844, 3 Bell, 342, which was followed by *Lindsey* v. *Oswald*, 2 Macph. 249; 21 March 1867, 5 Macph. (H.L.) 12.

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or contraction of debt, or to put in force the machinery of irritant and resolutive clauses applicable to acts of that description.[1]

Summary of the doctrine of imperfect entails antecedent to the Entail Amendment Act.

899. The result of the principles of law applicable to imperfect entails, prior to the Entail Amendment Act, may be thus stated. (1) An entail was effectual for all purposes when it contained prohibitory, irritant, and resolutive clauses applicable to acts of alienation and contraction of debt, and a simple prohibition to alter the succession. (2) An entail which did not prohibit the alteration of the succession was neither binding *inter hæredes* nor in a question with creditors. (3) An entail defective in the restraining clauses applicable to *one of the two* acts of alienation and contraction of debt, was binding in other respects, and could only be defeated by doing the act which was not effectually restrained. (4) An entail which merely prohibited alteration of the succession was binding *inter hæredes*.

Defect in irritant or resolutive clause applicable to alienation or contracting debt invalidated the prohibition.

900. As regards the prohibitions directed against alienation and the contraction of debt, it must be understood that a defect in the irritant or in the resolutive clause applicable to one of these prohibitions was fatal to the prohibition. It was at one time maintained, and the argument prevailed with the Court of Session, that although an entail without irritant and resolutive clauses was not binding upon creditors, yet that in a question *inter hæredes* the heir in possession was bound by the prohibitions, and therefore, if he sold or burdened the estate, an action would lie at the instance of the heir-substitute for reinvestment of the price.[2] But the

[1] This proposition is well illustrated by the form of the action in which judgment was pronounced in the *Overton* case. One of the grounds of action, and the only one on which the judgment of the House of Lords proceeded, was that the deed of entail contained *no sufficient prohibition against altering the order of succession.* The heir in possession brought an action to have it declared that, notwithstanding the entail, he had the right to make up titles in fee-simple, &c., *and to sell the estate and dispose of the price at his pleasure.* The Lord Ordinary declared and decerned in terms of the conclusions of the summons, and, on appeal, his Lordship's judgment was sustained and that of the Inner House reversed; *Lang* v. *Lang*, 16 Aug. 1839, M'L. & Rob. 871. In previous cases, where objection was taken to the prohibition to alter the succession, the conclusions were to the effect that the pursuer was entitled to expede a new investiture in favour of himself, his heirs and assignees, and thereafter to sell and dispose of the estate at his pleasure. Such are, *Purves' Trs.* v. *Campbell*, 1814, Hume, 873; *Henderson* v. *Henderson* (Earlshall case), 21 Nov. 1815, F.C.; and *Gilmour* v. *Cadell* (Liberton case), 5 July 1838, 16 Sh. 1261. On the other hand, in *Syme* v. *Dickson*, 3 March 1821, F.C., where the entail contained no prohibition against altering the succession, a trust-deed for payment of debts was held ineffectual because not proceeding on the narrative of an intention to alter the succession. It has been laid down that creditors cannot force an heir of entail to alter the succession for their benefit; *Cochrane* v. *Bogle*, 11 D. 920, per Lord Moncreiff.

[2] *Gordon Cumming* v. *Gordon* (Pitlurg case), 1761, M. 15,513; *Young* v. *Young*, 1761, 5 Br. Sup. 884; *Sutherland* v. *Sinclair*, 1801, M. "Tailzie," App. No. 8; *Lockhart* v. *Denham*, 11 June 1811, F.C.; this case was appealed, and afterwards

House of Lords, on a consideration of the difficulty of enforcing obligations of this nature, and the anomalous results to which their enforcement would lead, came to the conclusion that the Legislature could not have intended to impose the obligation, and consequently that wherever a stranger was entitled to purchase or to acquire an effectual security over an entailed estate, the heir in possession was entitled to the consideration money.[1] The doctrine, then, that simple prohibitions are binding *inter hæredes*, as we have seen, did not hold good with reference to prohibitions directed against the alienation of the estate for onerous causes, or the contraction of debt so as to affect it. A prohibition against altering the succession was effectual to restrain alienation by *mortis causa* settlement, or by gratuitous deed *inter vivos*.[2]

Doctrine of the *Duntreath* case: Prohibitions and fetters of entail must be applied to the institute.

901. II. OMISSION TO BIND THE INSTITUTE.—In the class of imperfect details may be placed those settlements in which the entailer has omitted to direct the restraining clauses against the institute. That prohibitions, which in terms are only applicable to "heirs of tailzie," do not bind the institute, or immediate disponee, was the point decided in the celebrated *Duntreath* case,[3]—a case which is constantly cited as the leading authority in the law of entail, because by it the canon of *strict construction* was established as the rule of decision for all questions upon the validity or efficacy of restraining clauses.[4] Without calling in question the importance of Lord

remitted to the Court of Session for the opinion of the whole Court, but no further procedure took place. *Ascog* and *Tillicoultry* cases, *infra*.

[1] *Stewart* v. *Fullerton* (Ascog case), 16 July 1830, 4 W. & S. 196; *Bruce* v. *Bruce* (Tillicoultry case), *eo die*, 4 W. & S. 240. These cases having been decided in the Court of Session in conformity with the opinion then prevalent, were by the House of Lords remitted for the opinion of the whole Court. The Judges, by a majority, adhered to their former decision. The cases were then heard by the Earl of Eldon, Lord Wyndford, and Lord Chancellor Lyndhurst, and, in conformity with their opinion, the judgment of the Court of Session was reversed. A similar decision was pronounced in a case where the alleged contravention consisted in the granting of long leases; *Duke of Queensberry's Exrs.* v. *Marquis of Queensberry*, 16 July 1830, 4 W. & S. 254. See also *Lord Elibank* v. *Murray*, 11 Sh. 858; 19 March 1835, 1 S. & M'L. 1; *Campbell* v. *M. of Breadalbane*, 1 D. 81; 1 April 1841, 2 Rob. 109; *Montgomerie* v. *Earl of Eglinton*, 4 D. 425; 18 Aug. 1843, 2 Bell, 149.

[2] *Carrick* v. *Buchanan*, 3 Sept. 1844, 3 Bell, 342, and cases there cited; *Lindsey* v. *Oswald*, 2 Macph. 249; 22 March 1867, L.R. 1 Sc. Ap. 99, 5 Macph. (H.L.) 12. And see *Cathcart* v. *Cathcart*, 18 July 1831, 5 W. & S. 315, per Lord Chancellor Brougham, p. 346, citing Lord Kilkerran in *Gairdner* v. *Primrose*, 1744, M. 15,501.

[3] *Edmonstone* v. *Edmonstone*, 1769, M. 4409, 15 April 1771, 2 Pat. 255.

[4] In giving judgment in *Macgregor* v. *Brown*, Lord Brougham stated that he had frequently heard Lord Eldon, in the House of Lords, express his opinion that the *Duntreath* case was the canon of the law of entail; 3 S. & M'L. 118. Lord Brougham himself cited it more than once in conjunction with the *Ascog* and *Tillicoultry* cases, as one of the cases in which the ancient law of Scotland had been restored by the House of Lords in opposition to the opinions of the Judges of the Court of Session.

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Mansfield's judgment in this aspect of it, it may be observed that, where the rule of strict construction is granted, the questions presented in the *Duntreath* class of cases present no difficulties, and the discussion may be confined to a statement of their import in the shortest possible compass. There are two questions which may arise with reference to the institute. *First*, Are the three statutory prohibitions, with the relative irritant and resolutive clauses, applicable to the institute? *Secondly*, Is the person who claims immunity from the fetters of the entail the institute according to the conception of the entail?

What words sufficiently describe the institute.

902. (1.) The question being, whether the institute is named or described along with the heirs of tailzie, it is frequently only necessary to read the restraining clauses to ascertain whether they apply to him. The *Findrassie*[1] and *Duntreath*[2] entails present no questions of construction; the restraining clauses are in terms applicable to heirs of tailzie and provision only. In the *Gordonstone* case[3] the statutory clauses of the entail commence with the words, "It shall be noways leisome nor lawful to the heirs of tailzie above designed, nor the heirs who shall happen to succeed *to the said lands and dignity*." In other parts of the clauses the words "the said heirs" are employed to designate this class of persons; and it was maintained, but without success, that though Sir Robert Gordon, the institute, was not an heir of tailzie, he was an heir succeeding to the baronetcy, and therefore within the terms of the description. In *Miller* v. *Cathcart*[4] the words were "heirs of entail, or any of them." In these cases arguments drawn from other parts of the deed to prove that the entailer intended to fetter the institutes were disregarded, and the estates were found to be liable to their debts and obligations. To the same class of cases belongs *Steele* v. *Steele's Trustees*,[5] where the entailer begins by directing that every *person and heir* succeeding to the estate shall take and

[1] *Leslie* v. *Leslie*, 1752, Elch. "Tailzie," No. 49. The action was brought to compel the institute, Alexander Leslie, to make up a title under the entail. The Court found that Alexander Leslie, *being fiar*, was not liable to the irritancies contained in the entail, and gave judgment accordingly, thereby overruling the earlier case of *Willison* v. *Willison*, 1726, M. 15,458.

[2] *Edmonstone* v. *Edmonstone*, *supra*. The action was brought to have it declared that Archibald Edmonstone, the institute, was not subject to the restraining clauses of the entail. The judgment of the House of Lords declares "that the appellant being fiar or disponee, and not an heir of tailzie, ought not, by implication from other parts of the deeds of entail, to be construed within the prohibitory, irritant, and resolutive clauses, laid only upon the heirs of tailzie."

[3] *Gordon* v. *Hay*, 1777, M. 15,462, and "Tailzie," App. No. 2; *M. of Titchfield* v. *Cuming*, M. 15,467; 20 June 1800, 4 Pat. 157.

[4] *Miller* v. *Cathcart* (Carbiston Entail), 1799, M. 15,471.

[5] *Steele* v. *Steele's Trs.* (Baldastard Entail), 12 May 1814, F.C.; 24 June 1817, 5 Dow, 72, 6 Pat. 322.

bear the name and arms of Steele of Baldastard, and then proceeds to tie up the estate by the usual clauses, which, however, are not directed against persons and heirs, but against "heirs and members of tailzie." The last-mentioned words were held not to apply to the institute. In a subsequent case it was maintained in argument that "member of tailzie," standing alone, would have included the institute, but that its meaning was modified or controlled by being placed in juxtaposition with the word "heirs." It is satisfactory to find that this view of the case was repudiated in the Court of last resort; for, if a word properly applicable to the institute (which "member of tailzie" is *not*) were held to lose that meaning by being associated with "heirs," it would be impossible by the use of any language short of naming the individual to express that the institute should be subject to the prohibitions.[1]

Institute not let in by words of relation prefixed to "heir" or "member."

903. Observing that the words *heir* and *member* are to be construed according to their natural meaning, and that they do not in their natural meaning apply to the institute, it is a consequence of the canon of strict construction that those words must be limited to their natural meaning when used in any part of the restraining clauses, notwithstanding that the institute is expressly designed in another part of the same set of clauses. The use of the demonstrative "said" makes no difference. The entailer, we will suppose, begins by laying the prohibitions upon the *institute and heirs*. He then adjects an irritant clause applicable to "the said heirs of tailzie." Who are the "said heirs"? Only the heirs already mentioned; not the institute; because he was not mentioned as an heir, but under his proper application. This simple consideration solves or explains the remaining cases of *Simprim*,[2] *Herbertshire*,[3] *Lanrick*,[4] and

[1] We refer to Lord Brougham's observations on this case in *Macgregor* v. *Brown*, 3 S. & M'L. 84. "I take it to be clear," he says, "that according to the principle of the case, that, supposing 'heirs' had not been objected to, 'members of tailzie' would not have included the institute. The word *tailzie* is the material word, for he is not a member of tailzie; he is no more a member of tailzie than he is an heir of tailzie; he is the first disponee or first taker by purchase" (3 S. & M'L. 112).

[2] *Murray* v. *Lord Elibank*, 2 July 1833, 11 Sh. 858; 19 March 1835, 1 S. & M'L. 1. Here the prohibitions were applied to the institute, Patrick Murray, *nominatim*; but the irritancy was only of the "debts and deeds of *the said heirs of tailzie*, or either of them." The institute was held entitled to sell.

[3] *Morehead* v. *Morehead*, 2 July 1833, 11 Sh. 863; 31 March 1835, 1 S. & M'L. 29. The prohibitions were directed against the institute by name, and there was a general introductory clause declaring that the conditions, &c., "and clauses irritant after exprest," should be binding upon him as well as upon the heirs-substitute. But the irritant and resolutive clauses were in terms only applicable to *heirs*. Lord Brougham laid down that no general words referring to a disponee and to heirs of tailzie can fetter the disponee if the restrictive clauses do not directly apply to him, and wished to insert a declaration in these terms in the judgment.

[4] *Brown* v. *Macgregor*, 11 March 1837, 15 Sh. 837; 12 Feb. 1838, 3 S. & M'L. 84. The irritant clause provided that,

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Fingalton,[1] as well as the case of *Campbell* v. *The Marquis of Breadalbane* in relation to the lands of Achnonard.[2] It is not very likely that a Court of law will again be called upon to declare an estate free from the fetters of an entail on account of a blunder so palpable and glaring as that of the omission to apply the restraining clauses to the institute.

Institute bound where fetters are applied to "persons," or where the prohibition is in general terms.

904. The cases in which irritant and resolutive clauses similarly worded have survived the ordeal of strict construction are of two kinds:—1*st*, where the word *person* is used in conjunction with "heir;" 2*dly*, where the irritant clause simply annuls all deeds in contravention of the prohibitions, without mentioning heirs, or only mentioning them in such a way that the words may be treated as surplusage. To the first description belong the cases of *Syme* v. *Dickson*[3] and the *Dougalston* case;[4] to the second, the *Aboyne* case and the case of *Carrick Buchanan*,[5] known better as an authority for the proposition that a prohibition against altering the succession does not require to be fenced with irritant and resolutive clauses. In consequence of the judgment on the latter point, it was not absolutely necessary to determine the sufficiency of the irritant clause as applied to the institute, a consideration which may tend to weaken the authority of this decision, should occasion arise for invoking the lenient spirit of criticism which characterises it.

905. (2.) It has been seen that an entail, if intended to be

"in case the *heirs descending of my body*, or any, &c., shall contravene," &c., and the argument used (unsuccessfully) was that the institute, though not an heir of entail, was an heir of the body of the entailer. See the distinction taken by Lord Brougham, p. 115, between words of limitation (or destination) and words of purchase (or, as we should say, of designation).

[1] *Logan* v. *Logan*, 1 Aug. 1839, M'L. & Rob. 790; stated *infra*, § 906.

[2] *Campbell* v. *Breadalbane*, 23 Nov. 1838, 1 D. 81; 1 April 1841, 2 Rob. 109.

[3] *Syme* v. *Dickson*, 1799, M. 15,473; 25 April 1803, 4 Pat. 471. The resolutive clause was directed against the "person or persons, heirs of tailzie foresaid," and the ground of decision apparently was that "person," in the singular, was disjoined from heirs of tailzie, and might mean a person other than the heir.

[4] *Douglas and Co.* v. *Glassford*, 14 Nov. 1823, 2 Sh. 487, N.E. 431; 10 June 1825, 1 W. & S. 323. This case presents no difficulty. The resolutive clause was applied to "each and every *heir or person* contravening."

[5] *Carrick-Buchanan* v. *Carrick*, 25 Jan. 1838, 16 Sh. 358; 5 Sept. 1844, 3 Bell, 342. The irritant clause provided that "all debts, deeds, and acts contracted, granted, or done contrary to these conditions and restrictions . . . shall be of no force, strength, or effect, and shall be ineffectual and unavailable *against the other heirs of tailzie and heirs whatsoever succeeding to my said lands and estate.*" The Law Lords were of opinion that the words in italics were surplusage, or at least that the words "other heirs" did not necessarily imply that no acts of contravention were annulled other than those committed by an heir of entail. See also *Seton* v. *Seton*, 1 March 1854, 16 D. 658; and *Lindsay* v. *Earl of Aboyne*, 5 Sept. 1844, 3 Bell, 254. In the terms of the clauses, and the grounds of the decision, these cases are similar to that of *Buchanan* v. *Carrick*.

Who is the person taking the estate in the character of institute?

binding on the institute, must be made specially applicable to him in its prohibitions and fetters. In every entail there is an institute; if, then, the restraining clauses are in terms directed only against the *heirs of entail*, the question arises, which is the person to whom, in the character of institute, a fee-simple estate is given? This question, it will be observed, is put with reference to the initial or elementary destination, and the decided cases enable us to answer it with reference to all the forms of elementary destination. (1) To the entailer himself, whom failing, to heirs named or designed; here the entailer is the institute; but in this case the entail, if obligatory at all, is so, not in virtue of the restraining clauses, but in respect of the cause of granting, as marriage, mutual engagement, or the like.[1] (2) To a person in being, named or designed; whom failing, to heirs named or designed; here the person to whom the estate is first given, if he takes the estate, takes it as the institute, or immediate disponee.[2] (3) The destination being as before, to different persons in succession in fee, if the person first named dies without having acquired the estate, does the next surviving heir take as conditional institute; and, if so, is he bound by the fetters of the entail, supposing these to be directed only against "heirs of tailzie"? This was the question decided in the affirmative in the *Seaforth* case.[3] The terms of the judgment in the Court of Appeal proved that, in Lord Eldon's opinion, the first taker would succeed in the character of conditional institute; since the decision in the case of *Fogo* v. *Fogo*,[4] it is no longer doubtful that he does so. The *Seaforth* case is therefore a decision to the effect that fetters imposed upon a grantee in the character of an heir of entail are obligatory upon him in the case of his taking the estate in the character of conditional institute. The reason is obvious—the estate given to the disponee is the estate of an heir of entail; his succession in the character of conditional institute results from the

[1] *Gordon* v. *Macculloch*, 1791, M. 15,465; *Maxwell* v. *Maxwell* (Munshes), 1817, Hume, 875.

[2] *Erskine* v. *Balfour-Hay*, 1758, M. 4406.

[3] *Mackenzie* v. *Mackenzie*, 24 Nov. 1818, F.C.; 13 May 1822, 1 Sh. (App. Ca.) 150. The judgment bears that the appellant, the Hon. M. F. E. Stewart Mackenzie, is, by force of the words in the deed constituting her an heir of entail, substituted on failure of her brother, Francis John Mackenzie, and the other heirs aud substitutes by the said deed appointed to succeed to the lands and estates prior to the disposition in favour of the said appellant. And therefore it is declared, that as her title to the said lands and estates is only by force of the words in such deed of entail constituting her expressly an heir of entail so substituted, the said appellant is bound by the conditions, declarations, restrictions, limitations, clauses irritant and resolutive, contained in the said deed of entail,—p. 155.

[4] *Fogo* v. *Fogo*, 25 Feb. 1840, 2 D. 651; remitted 22 June 1841, 2 Rob. 440; advised 11 March 1842, 4 D. 1063 judgment given 18 Aug. 1843, 2 Bell, 195.

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rule of law that a substitution includes a conditional institution in the same character; and by the operation of that rule he can take no other or higher estate than that which is given to him by the settlement.

Same question, where estate is first given in liferent.

906. The other elementary destinations are those in which the estate is given, in the first instance, to one or more persons in liferent, namely—(4) to the entailer himself or to another person in liferent, or to several persons, conjunctly or in succession, in liferent, and to a person in being in fee; whom failing, to others: the person first called as fiar is the institute.[1] (5) To A. and B. in conjunct fee and liferent, and to the heirs of A. (of a certain class), whom failing, to others: according to the law of interpretation of destinations, A. is a fiar; he is therefore the institute in the entail. To A. in liferent, and to B. and C. in conjunct fee and liferent; whom failing, to the heirs of B. (of a certain class): B. is the institute in the entail.[2] (6) To A. for his liferent use *only;* whom failing, to his eldest (or second, or other) son, whether *in esse* or unborn, in fee, with a destination over: the child first called as fiar, although born after the date of the settlement, is the first taker of the beneficial fee, and therefore the institute in the entail; the fiduciary fee, which the law implies in the gift to the parent, being a mere trust to preserve the estate until the birth of the person to whom it is given according to the conception of the destination.[3]

Under the Statute 1685, heir possessing on imperfect entail could not cure the imperfection by a new entail.

907. The consequences of defects in the statutory restraining clauses have been pointed out in the course of our general examination of the law of imperfect entails. The most general form in which the doctrine of imperfect entails admits of being stated is this, that, until the law was altered by the Entail Amendment Act,[4] the estate was subject to the debts and deeds of the disponee or heir in possession, except in so far as he was restrained by the fetters of the entail. One consequence of this doctrine remains to be stated. An heir in possession under an entail which prohibited the alteration of the succession (and there could be no obligatory entail which did not), could not make a new entail with more stringent fetters even in favour of the same series of heirs.[5]

[1] *Wellwood* v. *Wellwood* (Garvock), 1791, M. 15,463, and F.C. *Menzies* v. *Menzies* (Culdares), 1785, M. 15,436; remitted 30 June 1801, 4 Pat. 242; affirmed 20 July 1811, 5 Pat. 522; *Marchs. of Titchfield* v. *Cuming*, 1798, M. 15,467, 20 June 1800, 4 Pat. 157.

[2] *Steele* v. *Steele's Trs.* (Baldastard), 12 May 1814, F.C, ; 24 June 1817, 5 Dow, 72, 6 Pat. 322.

[3] *Logan* v. *Logan* (Fingalton), 20 Dec. 1836, 15 Sh. 291 ; 1 Aug. 1839, M.L. & Rob. 790.

[4] 11 and 12 Vict., cap. 36, § 43.

[5] The above-mentioned provision of the Entail Amendment Act, by which defective entails are universally left open to the attacks of creditors, also furnishes the means of correcting the defect, by enabling the heir in possession for the time being to acquire the estate in fee-simple, after which he is in a position to execute

He was bound by the prohibition against alteration to possess the estate on the title under which it had been handed down to him; and though that title left the estate open to the diligence of the creditors of future heirs, the defect could not be supplied, but the deed, with all its imperfections, must have subsisted as the law of the investiture until the destination came to an end.[1]

a new entail, which will be binding upon his immediate descendants. The cases in which this provision has been taken advantage of are already very numerous. They constitute a large proportion of the cases cited in the first two sections of the next chapter (Construction of Prohibitory, Irritant, and Resolutive Clauses).

[1] *Urquhart* v. *Urquhart*, 13 D. 742; 14 July 1853, 1 Macq. 658, and cases there cited; *Cochrane* v. *Baillie*, 9 March 1855, 17 D. 659; 12 March 1857, 2 Macq. 529; *Scott* v. *Scott*, 6 Dec. 1855, 18 D. 168; *Munro* v. *Munro*, 13 Feb. 1810, F.C.

CHAPTER XXVII.

STATUTORY REQUISITES OF A STRICT ENTAIL.

1. Of the Three Statutory Prohibitions.
2. Of the Irritant and Resolutive Clauses.
3. Of the other Solemnities required by the Act 1685.
4. Consequences of incurring an Irritancy.

SECTION I.

Of the Three Statutory Prohibitions.[1]

Registration is now equivalent to clauses of prohibition.

908. By the Titles to Land Consolidation Act, 1868 (re-enacting the provisions of 11 and 12 Vict., cap. 36, section 39, and 21 and 22 Vict., cap. 76, section 18) it is enacted in section 14, that "Where a deed of entail contains an express clause authorising registration of the deed in the register of tailzies, it shall not be necessary to insert clauses of prohibition against alienation, contracting debt, and altering the order of succession, and irritant and resolutive clauses, or any of them; and such clause of registration contained in any deed of entail of lands not held by burgage tenure dated on or after the first day of October one thousand eight hundred and fifty-eight, or of lands held by burgage tenure dated

[1] By the Titles to Land Act, 1858 (21 and 22 Vict., cap. 76, § 18), it is enacted that "Where a deed of entail contains an express clause authorising registration of the deed in the Register of Tailzies, it shall not be necessary to insert clauses of prohibition against alienation, contracting debt, and altering the order of succession, but such clause of registration shall have in every respect the same operation and effect as if such clauses of prohibition had been inserted according to the present law and practice, and duly fenced with irritant and resolutive clauses." The Act of 1860 (23 and 24 Vict., cap. 143, § 12) contains a similar provision with respect to entails comprehending lands held burgage.

It had previously been enacted by the Entail Amendment Act (11 and 12 Vict., cap. 36, § 39), "That in any tailzie dated on or after the first day of August one thousand eight hundred and forty-eight, containing an express clause authorising registration in the Register of Tailzies, it shall not be necessary to insert any irritant or resolutive clauses in order to render such tailzie effectual in terms of an Act of the Parliament of Scotland passed in the year One thousand six hundred and eighty-five, entitled *Act concerning Tailzies*, but such clause of registration shall have in every respect the same operation and effect as the most formal irritant and resolutive clauses duly applied to every prohibition, condition, restriction, and limitation contained in such tailzie, except only such prohibitions, conditions, restrictions, and limitations as by the terms of such tailzie may be specially excepted."

on or after the tenth day of October one thousand eight hundred and sixty, shall have in every respect the same operation and effect as if such clauses of prohibition, and such irritant and resolutive clauses, had been inserted in such deed of entail, any law or practice to the contrary notwithstanding." The exception of lands held in burgage tenure is now inoperative in consequence of the abolition of burgage as a distinctive tenure by the Act of 1874. By section 9 of the Act of 1868 it is sufficient in the case of any new entail to refer to the destination and entailing clauses as set forth at length in any recorded deed of entail.

Technical language not necessary to constitute a valid prohibition.

909. INTRODUCTORY.—It has frequently been observed, and the decisions support the statement, that technical language is not necessary to the expression of a valid prohibition.[1] The investigation on which we are to enter will show that rarely, if ever, has an entail been found to be invalid in consequence of the use of inartificial or popular language to express a prohibition which the granter knew to be requisite to its constitution. In the majority of cases, the failure to give adequate expression to the statutory requisites of an entail will be found to be the result either of mere inadvertence, or of the use of expletive or redundant phraseology.

Limits of the subject of the chapter.

910. In the consideration of the subject of the three statutory prohibitions, the discussion is designed to have especial reference to the questions, what are the acts which must be prohibited, and how far does the phraseology employed in the cases which have been the subject of adjudication conform to the requisites of an effectual prohibition in terms of the statute? It is not proposed to treat of those cases in which objections were taken to deeds of entail on the ground of defects in the feudal clauses such as are common to entails and other conveyances of lands. We are only concerned with entails considered as *deeds of settlement*.[2] It may here be noticed that a decision in favour of the entail in an action directed against heirs-substitute is binding on a purchaser from the party pursuer, and, as it would seem, on all concerned.[3]

911. Before entering on the consideration of the restraining

[1] "An entail must contain a substantive prohibition against alienation; a substantive prohibition against contracting debt; and a substantive prohibition against altering the order of succession. There is no set form of words in which these three prohibitions require to be expressed; nor is a separate and distinct clause, of any given style, necessary for each several prohibition. But the three substantive prohibitions must be all there, and all of them expressed."—Per Lord Corehouse in *Little Gilmour* v. *Cadell* (Liberton case), 16 Sh. 1267; cited with approbation by Lord Cottenham in the *Overton* case, M'L. & Rob. 887.

[2] As an example of the class of cases excluded from consideration, we cite *Munro* v. *Munro*, 3 W. & S. 344, on the point of omission of the words "for new infeftment," in an entail in the form of a procuratory of resignation.

[3] *Padwick* v. *Stewart*, 1874, 1 R. 697.

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Prohibition must be applied distinctly to the persons and estate.

words appropriate to each species of prohibition, it may be noticed that a prohibition, whatever its object may be, must be made distinctly applicable to the entailed estate, and to all the persons (including the institute) who are intended to be bound by it. Of uncertainty as to the application of prohibitions to the estate, there is an example in the case of the *Earl of Leven and Melville* v. *Cartwright*.[1] The subject of the application of the fetters to the institute has already been discussed.[2] Cases have arisen, and others may be figured, where it is doubtful whether the prohibitions were applied to all the heirs of tailzie, or only to the heirs of a particular class, indicated by the context. This is illustrated by the case of *Dunbar* v. *Dunbar*,[3] where a proprietor executed an entail of his estate and baronetcy in favour of certain heirs; but, according to the terms of the subsisting destination, the baronetcy was limited to a different series of heirs. The prohibitions against selling and contracting debt were directed against the heirs of tailzie generally, and also against "their heirs who shall happen to succeed *to the said lands and dignity*." One of the heirs substitute, who succeeded to the lands without the dignity, brought an action against the other heirs of entail to have it declared that the estate belonged to himself free from those restrictions, but the action was unsuccessful.

Principle of construction illustrated.

912. In *Munro* v. *Munro*[4] the entail contained a clause intended to exclude from the succession any heir who, in consequence of having succeeded to any other title or dignity, should be disabled from bearing the name and arms of *Munro of Foulis*. This was followed by the usual statutory prohibitions, which were directed against the *heirs of tailzie particularly and generally before mentioned*. It was contended by the heir in possession, but without success, that the prohibitions were applied only to those heirs,

[1] *Earl of Leven and Melville* v. *Cartwright*, 12 June 1861, 23 D. 1038.

[2] *Supra*, Chapter XXVI., Section III.

[3] *Dunbar* v. *Dunbar* (Hempriggs), 1799, M. 15,452; Duncan's Digest of Entail Cases, page 2. It is unnecessary that we should repeat the references to this most useful work, as the cases reported in it are indexed under the names of persons and places. The writer has in numerous instances been indebted to this Digest for complete references to the terms of the restraining clauses, which, in the older reports, are often not given at length, but which Mr. Duncan, with a conscientious devotion to his subject which those engaged in similar avocations can best appreciate, has collected from the original pleadings. It is to be regretted that the Digest is confined to cases upon the validity of the restraining clauses of entails.

[4] *Munro* v. *Munro*, 15 Feb. 1826, 4 Sh. 467, N.E. 472; 25 July 1828, 3 W. & S. 344. See also *Nairn* v. *Nairn*, 1736, Elch. "Tailzie," No. 5; 14 May 1736, Cr. St. & Pat. 192, where there was a clause "prohibiting the heirs-female of the said Margaret, her body, *or any other* of the heirs-male and of tailzie above written (except the heirs-male of the said Margaret's body), to sell," &c.; and it was found that the prohibition applied to Margaret, Lady Nairn.

referred to in the previous clause, who should succeed to a title, and who, according to that clause, were bound to denude of the estate. The above are cases in which the Court has refused to admit what has been termed a "malignant construction" for the purpose of defeating the entail. In any view, it should seem that the words "entailed estate" and "heirs of tailzie," or "substitutes,"[1] sufficiently designate the subject, and the objects of the disposition.

Prohibitions and restraining clauses cannot be constituted by reference to previously executed entails.

913. We pass to another general proposition applicable to every part of the mechanism of the restraining clauses, which is, that the prohibitory, irritant, and resolutive clauses must be complete in themselves, so that the sense is expressed without the necessity of reference to other instruments containing corresponding provisions. The leading case is that of *Countesswells*,[2] where a proprietor, having executed a valid deed of entail containing proper restraining clauses, by a subsequently executed settlement revoked the destination contained in the first-mentioned deed of entail, and disponed the estate to a different series of heirs, "under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolutive, of the said entail." This deed did not contain executorial clauses; consequently, a title was made up by adjudication in implement, and in the decree and relative charter of adjudication the prohibitory, irritant, and resolutive clauses were engrossed at length. It was held (1) that the second deed was a new settlement of the estate, and that it could not receive effect as a nomination of heirs supplementary to the first deed; and (2) that, as a new settlement, it did not constitute an entail effectual against purchasers, because it did not contain the prohibitory, irritant, and resolutive clauses required by the Statute. In the subsequent case of *Forbes* v. *Gammell*,[3] in relation to the

[1] In *Dalrymple* v. *Hunter*, 17 June 1784, 6 Pat. 807, the restraining clauses were directed against the "substitutes before mentioned, and described by name;" and this was held to include the descendants of the body of the heirs-substitute previously named. In *Holmes* v. *Cuninghame*, 13 Feb. 1851, 13 D. 689, the resolutive clause of an entail was directed against the institute, "or any of the other of tailzie above specified;" the omission of the word "heirs" in this connection was held immaterial.

[2] *Gammell* v. *Cathcart*, 13 Nov. 1849, 12 D. 19; 13 Dec. 1852, 1 Macq. 362; *Broomfield* v. *Paterson*, 1784, M. 15,618; 19 May 1786, 3 Pat. 51. The judgment bears, "That, in respect the disposition of 1758 differs in several articles from the entail of 1783, . . . and that this disposition was followed by charter and infeftment, therefore it is to be held *a new settlement of the estate*. In two later cases the same principle of construction was applied, *i.e.*, that the new deed, admittedly incomplete, could not receive effect as a *nomination* of heirs, because the old and new destinations were fundamentally distinct; *Munro* v. *Butler-Johnstone* (Corehead), 1868, 7 M. 250; *Fowler* v. *Fowler*, 1869, 7 M. 420. See also a sequel to the *Countesswells* case, *Kenny* v. *Taylor*, 1875, 2 R. 636. The above were cases *inter hæredes*.

[3] *Lord Forbes* v. *Gammell*, 14 May 1858, 20 D. 917. See also *Lindsay* v. *Earl of Aboyne*, 2 Mar. 1842, 4 D. 843; 3 Sept. 1844, 3 Bell, 254; *Paterson* v.

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estate of Drumtochty (which was settled by the same entailer and in the same terms as the *Countesswells* estate), it was held that a deed of entail, bearing reference to the prohibitions and fetters contained in a previously executed deed, could not be interpreted as an obligation to convey under the conditions referred to, and that an entail could not be established by setting up the decree and charter of adjudication as the statutory deed of entail. And so, in *Cochrane* v. *Baillie*, where the deed contained an obligation to make an entail, followed by a procuratory of resignation in which the fetters were set forth by way of reference, it was held that no action lay for implement.[1]

Nomination of heirs need not contain restraining clauses *in gremio*.

914. An entailer, by reserving the necessary power, may alter the destination of the estate by a deed of nomination of heirs,[2] which deed need not contain the fetters of the entail in words at length (nor, it is presumed, even by reference); provided that there is such a reference to the deed of entail as shall effectually incorporate the nomination of heirs with the subsisting destination. And although such a nomination should take the form of an actual disposition to the substituted heirs, it would not be held to constitute a new settlement, unless it contained a revocation of the destination in the original entail.[3] Whether a partial revocation of the original destination, coupled with a nomination of or conveyance to the substituted heirs, would be held to be a new settlement, and so to render necessary a repetition of the prohibitions and fetters, is a question which, in the present state of the law, does not admit of a definite answer. It would seem, according to the observations of Lord St. Leonards in the *Countesswells* case,[4] that it is a question of circumstances, whether a nomination of heirs is equivalent to a new settlement. In that case, the original destination was entirely swept away, and the actual deed of destination was thus completely disjoined from the disposition containing the prohibitions and fetters. It was therefore, as already seen, held to be a new settlement of the estate, and ineffectual as an entail. In the case of *Fraser* v. *Lord Lovat*, the heirs nominated by the entailer, under

Leslie (Balquhain), 1 July 1845, 7 D. 950; *Cochrane* v. *Baillie*, *infra*. As to the case of *Lawrie* v. *Spalding*, 1764, M. 15,612, see observations by Lord Moncreiff, 4 D. 859, and by Lord St. Leonards, 1 Macq. 363. It would seem that an entail by reference was, prior to the Entail Amendment Act, a binding settlement *inter hæredes*,—*Don* v. *Don*, 1713, M. 15,591; but under that Act the heir in possession is entitled to take advantage of the defect to acquire the estate in fee-simple,—*Cochrane* v. *Baillie*, 17 D. 659, and 12 March 1857, 2 Macq. 529.

[1] *Cochrane* v. *Baillie*, *supra*.

[2] *Stewart* v. *Porterfield*, 15 May 1821, 1 Sh. 9, N.E. 6; remitted 24 May 1826, 2 W. & S. 369; judgment 23 Sept. 1831, 5 W. & S. 515.

[3] *Fraser* v. *Lord Lovat*, 28 Feb. 1842, 1 Bell, 105. The references to the previous proceedings, which were very protracted, will be found in Bell's report.

[4] 1 Macq. 364-5.

a reserved power, by the deed of 1812[1] were substituted in the destination, so as to have priority in the succession over the heirs of the original settlement; and that settlement was not even described by its date, but was only identified by reference to its provisions. The original destination, although not formally revoked, was virtually superseded, by reason of the heirs of the destination being postponed to those of a new destination which might last for ever. This case comes very near to making an entail by reference; nevertheless the deed of 1812 was held effectual as a nomination of heirs; and Lord St. Leonards, while suggesting (in his opinion in the *Countesswells* case) that it had not been well considered, does not in the result dissent from its conclusions, or dispute its authority as a precedent.[2]

Effect of erasures in the restraining clauses of entails.

915. The objection, that words material to the sense of prohibitory or other restraining clauses are written on erasures, may here be noticed, in so far as it involves the consideration of the principles of construction applicable to the superinduced writing. The rule of the law of Scotland in relation to erasures which are not noticed in the testing clause of the deed, is, as was seen,[3] that the erasure is presumed to have been made after the execution of the deed, and consequently that the words are to be taken *pro non scriptis*. If the erasure is *in substantialibus*, it may be fatal to the deed. When an erasure is said to be *in substantialibus*, this, according to the latest exposition of the law,[4] must refer to the words that are written on the erasure, and not to those which are supposed to have been obliterated. The supplying conjectural words, for the purpose of destroying the deed, is, according to the same authority, a "malignant construction," and is unsupported either by principle or authority.[5] The application of these rules to the construction of the restraining clauses of entails may be stated in the words of Lord Westbury: "The words written on the erasure are taken *pro non scriptis*. If such words are essential to the clause in which they are found, and the clause without them is insensible, the clause is void; and if the clause so avoided be essential to the deed, it follows that the deed also becomes void; but if, after rejecting the words written on the erasure, the words which remain are sufficient to enable the Court to ascertain the meaning of the clause, and to give its proper effect to it, then the words rejected are not indispensable, and the clause does not become void. If the erasure occurs in one of the fencing clauses of

[1] P. 110 of the report in 1 Bell. The original entail bears date 25 June 1808, and is quoted in 1 Bell, 105.

[2] 1 Macq. 365.

[3] See Authentication of Deeds.

[4] Per Lord Chelmsford, 4 Macq. 590.

[5] Per Lords Westbury and Chelmsford in *Gollan* v. *Gollan*, *infra*.

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a deed of entail, and the words written on the erasure are taken *pro non scriptis*, it is necessary that the remaining words should be a sufficient expression of the proper effect of the clause according to a strict and necessary construction of such remaining words. It is not sufficient that you are able to infer the intention from the words which remain; it is necessary that they should express that intention and no other."[1] An erasure would appear, therefore, to be equivalent in effect to a blank, or to the omission *per incuriam* of a part of the draft;[2] and so, where the word "not," or other essential word, is interlined or written in small characters between two current words, it is held *pro non scripto*.[3] If the fact of erasure be disputed, it is a subject of proof.[4]

Entail must prohibit acts of disposition. The word "alienate" is effectual, and comprehends leases.

916. II. PROHIBITION AGAINST ALIENATION.—A settlement intended to constitute a strict entail under the Act 1685 must contain a prohibition "whereby it shall not be lawful to the heirs of tailzie [or institute] to sell, annailzie, or dispone the said lands, or any part thereof." It is not necessary that all the operative words of the Statute should be used; it is enough that the act of disposition is prohibited. The word "alienate" appears to be the term most appropriate to the expression of the prohibition, as it is undoubtedly the most comprehensive in its meaning. It is the term most properly descriptive of conveyance in the form of a disposition or procuratory of resignation for new infeftment;[5] and it includes—as was found in the cases on the *Queensberry* leases,[6]—alienation by leases of unusual duration, or for an inadequate consideration. In *Bontine* v. *Bontine*[7] it was contended on the part of the heir in possession, that because the deed of entail contained a

[1] *Gollan* v. *Gollan*, 2 July 1863, 4 Macq. 585, reversing 24 D. 1410, see p. 587. See also *Bontine* v. *Bontine*, 19 March 1863, 1 Macph. 665, and the two following cases, on the construction of material words which were partly written on erasures, namely, *Boswell* v. *Boswell*, 31 Jan. 1852, 14 D. 378, and *Howden* v. *Glassford*, 7 July 1864, 2 Macph. 1317; *nom. Borthwick* v. *Glassford*, 9 Nov. 1853, 16 D. 37. In *Fraser* v. *Fraser* (11 March 1854, 16 D. 863), the words "it shall not be lawful," and in *Shepherd* v. *Grant* (21 July 1847, 6 Bell, 153), the words denoting the first heir-substitute, were written on erasures. These errors were held to be *in essentialibus*.

[2] Of this nature was the omission in the irritant clause of the *Hoddam* entail, *Sharpe* v. *Sharpe*, 18 April 1835, 1 S. & M'L. 594.

[3] *Munro* v. *Butler-Johnstone*, 1863, 7 Macph. 250.

[4] *Hamilton* v. *Lindsey-Bucknell*, 1869, 8 Macph. 323.

[5] Per Lord Meadowbank in *Hamilton* v. *Macdowal*, 3 March 1815, F.C. See pp. 313 and 329.

[6] *Duke of Queensberry's Trs.* v. *Earl of Wemyss*, 1807, M. "Tailzie," App. No. 15; 17 Dec. 1813, 5 Pat. 758; 2d Case, 25 May 1813, F.C., 12 July 1819, 1 Bligh, 337, and more fully, 6 Pat. 466 *et seq.* And see the case of *Duke of Roxburghe* v. *Ker*, 5 Pat. 609 and 768, as to feus. The subject of the exercise of powers of feuing and leasing under entails is treated *infra*.

[7] *Bontine* v. *Bontine*, 24 March 1864, 2 Macph. 918.

special prohibition to grant leases, except in the exercise of the powers thereby given, therefore the general prohibition against alienation was not intended to apply to leases, and that the special prohibition against alienation by leases was ineffectual, inasmuch as it was not fenced with irritant and resolutive clauses. This argument did not prevail, and the entail was held good. "It is settled law," said Lord Deas, "that in a deed of entail a prohibition to alienate is a prohibition against all leases not expressly permitted by the entail, with the exception of such as fall to be regarded as ordinary acts of administration. I further hold it to be clear, although not so authoritatively settled, that if there be two prohibitory clauses in an entail, directed against the same act or acts, the defective nature of the one will not prevent the other, if distinct and unequivocal in itself, from receiving effect." [1]

Alienation sufficiently prohibited by the use of the word "dispone."

917. The decision in *Glassford's Trustee* v. *Glassford*,[2] taken in connection with the earlier cases, leaves no room for doubt that the word "dispone" is sufficient for the purpose of a prohibition against alienation by other means than that of *de præsenti* conveyance.[3] In that case the objection taken was that the letter "n" of the word *dispone* in the prohibitory clause was written on an erasure, and the decision seems to have proceeded on the supposition that the word had been originally "dispose," which in the opinion of some of the Judges was a better word for the purpose than dispone, as being more comprehensive.[4] The terms of the prohibitory clause are not stated in the report; but we presume they had not included the word "alienate," which, as we have seen, would have been sufficient of itself to support the entail in so far as relates to the first of the statutory prohibitions.

"Sell" insufficient, as not including gratuitous alienations.

918. A prohibition *to sell* does not strike at gratuitous alienations, as was found in the case of *Russell* v. *Russell*.[5] Where an entail declared that it should not be in the power of the heirs succeeding to the estate "to sell, alienate, impignorate, or dispone the said lands and estate, or any part thereof, either *redeemably* or under reversion,"[6]—and in another case, where the word "*irre-*

[1] 2 Macph. 922.

[2] *Glassford's Tr.* v. *Glassford*, 7 July 1864, 2 Macph. 1317.

[3] See opinions in *Hamilton* v. *Macdowal*, *supra*. Also *Elliott* v. *Pott*, 14 March 1821, 1 Sh. (App. Ca.), 16; *Stirling* v. *Dun*, 22 June 1829, 3 W. & S. 462.

[4] According to the evidence of an engraver, the letter "s" of *dispose* was distinctly visible through the superinduced writing. As to the sufficiency of popular language, see *Cumming* v. *Gordon*, 1761, M. 15,513, where a prohibition "to squander or put away" the estate was held sufficient to bar alienation.

[5] *Russell* v. *Russell*, 7 Dec. 1852, 15 D. 192. Under this entail the Court sustained provisions granted to younger children before the date of the Entail Amendment Act, in excess of the powers competent to the proprietor as an heir of entail, and also found that the entail was invalid under the 43d section of that Act.

[6] *Earl of Eglinton* v. *Montgomerie*, 14 Feb. 1845, 7 D. 425; 8 July 1847, 6 Bell, 136.

deemably" was used, but the first four letters were written on an erasure,[1]—it was held that irredeemable sales were not effectually prohibited.

Prohibition against alienation not implied from expressions properly applicable to debts.

919. Prohibitions against alienation cannot be implied from expressions which are properly applicable to the contraction of debt or to the alteration of the succession; as, for example, that the heirs shall not "burden the said estate;"[2] or "infringe the foresaid tailzie;"[3] or "do any other fact or deed that may anywise affect, burden, or evict" the estate;[4] or "do any facts or deeds in prejudice of the other heirs their right of succession."[5]

Contraction of debt only to be prohibited in relation to the estate.

920. III. PROHIBITION AGAINST CONTRACTION OF DEBT.—With the exception of the *Carleton* case, and one other case in which the same style was followed, there are no reported decisions in which deeds of entail have been found defective in the terms of the prohibitory clauses applicable to the contraction of debt, and it would be useless to attempt to anticipate objections which have not occurred and which are not likely to occur in practice.[6] The prohibition desiderated by the Statute is one making it unlawful for the heirs succeeding to the estate "to contract debt, or do any other deed whereby the samen may be apprised, adjudged, or evicted from the other substitute in the tailzie." What is essential is a prohibition directed against the institute and all the heirs of entail[7] against the contraction of debt in such a way that the estate may be made the subject of eviction by adjudication or other legal diligence.[8] The reference to "other deeds whereby the estate may be evicted," which is usually inserted in compliance with the statutory formula, is understood to relate either to feudal delinquencies or to deeds *ejusdem generis* with the debts which are the substantive object of the prohibition. The Statute requires that the contraction of debt

[1] *Boswell* v. *Boswell* (Auchinleck), 31 Jan. 1852, 14 D. 378.

[2] *Hepburn* v. *Earl of Hopetoun*, 17 Feb. 1732, and on appeal, 5 April 1734, Duncan's Digest, p. 88.

[3] *Campbell* v. *Wightman*, 1746, M. 15,505.

[4] *Sinclair* v. *Sinclair*, 1749, M. 15,382; 14 Feb. 1750, Cr. St. & Pat. 459.

[5] *Scott Nisbet* v. *Young*, 1763, M. 15,516; 21 Feb. 1765, 2 Pat. 98.

[6] The unreported case of *Welsh* v. *Robertson*, 14 June 1820, cited in Duncan's Digest, p. 103, was, we hesitate not to say, erroneously decided, if any decision was meant to be given adverse to the efficacy of this clause, as to which see the interlocutor; Duncan's Digest, p. 169. By this entail it was declared not to be lawful "to contract debts, whereby the same [the estate] may be evicted or burdened to the prejudice of the next heir of taillie succeeding by the order above mentioned." Eviction, being a general term, must include eviction by legal diligence; and the case of *Seton*, 16 D. 659, is an authority to the effect that eviction from the next substitute, and not from the contravener himself, is the consequence which is contemplated by the words of the Statute, and against which it is necessary to direct the prohibition.

[7] See on this head *Wauchope* v. *Wauchope*, 1884, 11 R. 424.

[8] Per Lord President Colonsay in *Arbuthnott* v. *Arbuthnott*, 3 Macph. 837.

by the heirs of entail should be prohibited, not absolutely, but with reference to the estate [1] or to the interest of the substituted heirs.[2]

"Debt," or an equivalent word must be used.

921. It was suggested by one of the Judges in the second *Carleton* case,[3] that unless the word "debt" is used in the clause, the contraction of debt is not effectually prohibited. The modified statement of this proposition by Lord Deas, that the word "debt," or one of equivalent import, must be used is probably more correct.[4] "To wadset or burden with infeftments of annualrent, nor any other servitude or burden, . . . nor to do any other fact or deed . . . whereby the said lands may be affected," was the expression used in the *Carleton* entail, and this was found to be insufficient, first by Lord Moncreiff in 1830,[5] and more recently by the First Division of the Court [6] in an action founded on the 43d section of the Entail Amendment Act. And where an irritant clause, in the branch of it applicable to the prohibition against the contraction of debt, irritated in the event of contravention only "bonds" and "obligements made in the contrair," the entail was held ineffectual to protect the estate against even such debts as were constituted by bonds and obligements.[7]

Effect of expletive words: "Burden or affect;" "Security."

922. A prohibition "to contract debt upon the estate" is a sufficient compliance with the statutory requirement;[8] and the adjection of the words "by any security whatsoever" does not weaken the expression, for the words are properly descriptive of judicial securities (including adjudication), as well as of voluntary securities.[9] Objections to the prohibitions on the ground that the

[1] Per Lord Campbell, 3 Bell, 290; see also 3 Macph. 837, per Lord President M'Neill.

[2] *Seton* v. *Seton*, 1 March 1854, 16 D. 659.

[3] *Cathcart* v. *Cathcart*, 1 Macph. 766, per Lord Curriehill.

[4] 1 Macph. 767. See the case of *Sutherland* v. *Sinclair*, 26 Feb. 1801, F.C.; and M. "Tailzie," App. No. 8, where a clause was sustained prohibiting the heirs "to contract or take on *summes of money*, whereby the said lands and others foresaid may be affected or evicted from them."

[5] *Cathcart* v. *Cathcart*, 12 Feb. 1830, 8 Sh. 497, 502. The heir in possession had granted a bill for £150,000, without value, with the view of constituting a debt on which adjudication might follow. Lord Moncreiff found that the entail contained no prohibition against the contraction of debt whereby the estate might be adjudged or evicted, but that the heir had not in fact contracted any such debts. The judgment of the Court, and of the House of Lords on appeal, 5 W. & S. 315, affirmed his Lordship's judgment on the latter point only.

[6] *Cathcart* v. *Cathcart*, 31 March 1863, 1 Macph. 759. Similarly, *Fraser* v. *Fraser*, 1879, 7 R. 134.

[7] *Martin* v. *Sir G. Dunbar*, 17 July 1844, 6 D. 1320. See also *Cathcart* v. *Maclaine* (Lochbuy), 1 July 1846, 8 D. 970, where the omission of the words "to contract debt," in the charter and sasine following on an entail, was held to leave the estate open to execution for debt.

[8] *Dewar* v. *Burden*, 26 Nov. 1845, 8 D. 90; 25 March 1850, 7 Bell, 32; *Seton* v. *Seton*, 1 March 1854, 16 D. 659.

[9] *Arbuthnott* v. *Arbuthnott*, 27 May 1865, 3 Macph. 835, see the Lord President's observation, p. 838; also *Howden* (*Rocheid's Tr.*) v. *Rocheid*, July 16, 1869,

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entail contained powers of burdening the estate to a limited extent, or selling a part of it to satisfy provisions to younger children, have not been sustained.[1] In the *Aboyne* case,[2] a prohibition "to burden or affect [3] the said lands, in whole or in part, with debts or sums of money," was sustained by unanimous judgments in the Court of Session and House of Lords. "A prohibition," said Lord Campbell, "against burdening the land with debt, and a prohibition against contracting debt, whereby the land may be adjudged or burdened, having the same legal operation, are substantially the same. If the heirs of tailzie were to contract debt and allow the land to be adjudged for the debt, could it be contended that they had not 'burdened or affected the same, in whole or in part, with debt.' The express prohibition in this case commences at the point where the more general prohibition would practically begin to operate." In the *Finzean* case,[4] which was decided on appeal along with the *Aboyne* case, the words "or affect" were wanting. The clause, which in other respects was identical with that of the *Aboyne* entail, was held to import a prohibition to contract debt, satisfying the words of the Statute.

Frequency of errors in the expression of prohibition against altering the succession.

923. IV. PROHIBITION AGAINST ALTERING THE ORDER OF SUCCESSION.—This, according to the result of the decisions, appears to be the most vulnerable of the prohibitory clauses, as it was, according to the law which prevailed before the passing of the Entail Amendment Act, the one in which an error was most prejudicial to the entail. From the *Argaty* case to the case of *Elphinstone* v. *Burrell* in 1850, no less than sixteen cases are reported in which deeds of entail were challenged on the ground of defective expression of the statutory prohibition against altering the succession;[5]

7 Macph. (H.L.) 111, affirming 6 Macph. 300; *Hamilton* v. *Lindsey-Bucknell*, 1869, 8 Macph. 323.

[1] *Catton* v. *Mackenzie*, 1872, 10 Macph. (H.L.) 12; *Rogerson* v. *Rogerson*, 1872, 10 Macph. 698; *Malcolm* v. *Kirk*, 1873, 11 Macph. 722.

[2] *Lindsay* v. *Earl of Aboyne*, 2 March 1842, 4 D. 343; 5 Sept. 1844, 3 Bell, 254; *Cochrane* v. *Bogle and Co.*, 25 March 1850, 7 Bell, 65.

[3] The words "or affect" are not essential, *vide infra*.

[4] *Adam* v. *Farquharson*, 18 June 1840, 2 D. 1163; 5 Sept. 1844, 3 Bell, 295. These cases were decided on the authority of three prior cases in the Court of Session, *Haggart* v. *Vans Agnew* (Sheuchan), 19 Dec. 1820, F.C.; *Mackenzie* v. *Mackenzie*, (Newhall), 23 May 1823, 2 Sh. 331, N.E. 293; *Nisbet* v. *Sir D. Moncrieff* (Cappledrae), 10 June 1823, 2 Sh. 381, N.E. 339. In two of these cases the prohibitory clause was identical with that of the *Aboyne* and *Finzean* entails, and in the third it was the same in substance. A good summary of the previous cases will be found in Lord Jerviswoode's note to *Arbuthnott* v. *Arbuthnott*, 3 Macph. 836.

[5] Two cases of a different description, but presenting a considerable similarity in their circumstances, have been decided since the passing of the Entail Amendment Act; these are *Gollan* v. *Gollan*, 24 D. 1410, 4 Macq. 585; and *Bontine* v. *Bontine*, 19 March 1863, 1 Macph. 665. In both cases the deeds contained proper prohibitory clauses directed against the alteration of the succession, which, however, were alleged to be vitiated by

of these only three were found to contain effectual prohibitions; and one of the cases, that of *Lochbuy*,[1] after being repeatedly overruled, was formally pronounced by the House of Lords to be "no longer law."[2] The defective clauses in the cases which have been submitted to adjudication are all of the same general description; and the nature of the error is such that, when distinctly apprehended, no difficulty can be experienced in determining, in any other case, whether the prohibition falls within the exceptional category.

Prohibition held bad where alteration of the succession only prohibited consequentially.

924. According to the conception of the Statute 1685, the deed of entail ought to contain a positive prohibition directed against deeds whereby the succession is "frustrate or interrupted;" or, as it is usually termed, a substantive prohibition against alteration of the order of succession.[3] In the cases of the class to which we have referred—of which the *Earlshall* case[4] may be cited as one of the least open to criticism—the alteration of the succession was either not prohibited at all, or was prohibited as a consequence of the contravention of the previously expressed prohibitions against alienation and contraction of debt. This is very clearly explained in the speeches of Lords Cottenham and Brougham in the leading case of *Lang* v. *Lang*.[5] After reviewing the previous decisions, the Lord Chancellor proceeds,[6]—"The *Earlshall* case, in 1815, is stronger. The prohibition was against selling or contracting debts, or doing or committing any fact or deed, civil or criminal, whereby the said lands and estate, or any part thereof, might be in anywise adjudged, evicted, or forfeited anyways from them, or might be 'affected in prejudice and defraud of the subsequent heirs of tailzie and provision successively, conform to the order and substitution above specified.' Now, altering the order of succession would be most accurately described as 'a fact or deed whereby the estate would be affected in prejudice of the heirs of tailzie;' but the prohibition was held not to include alteration of the succession, because

erasures. In the first, the Court held that the superinduction upon an erasure of the letters "to inn" in a prohibition "to innovate, alter, or infringe the order of succession," was immaterial. In the second case, a similar opinion was expressed with reference to the superinduction of the words "to do" in a prohibition to do any act which might *import or infer* innovation, which was preceded by a substantive prohibition against alteration, to which no objection was stated.

[1] *Maclaine* v. *Maclaine*, 1807, M. "Tailzie," App. No. 14.

[2] In *Lang* v. *Lang*, M'L. & Rob. 896.

[3] A clause prohibiting the heirs from possessing the estate upon any other title than the entail does not import a prohibition against altering the succession; *Henderson* v. *Henderson*, *infra*; see Lord Alloway's interlocutor.

[4] *Henderson* v. *Henderson*, 21 Nov. 1815, F.C.

[5] *Lang* v. *Lang*, 23 Nov. 1838, 1 D. 98; 16 Aug. 1839, M'L. & Rob. 871.

[6] M'L. & Rob. 886.

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these terms were so involved in the prohibition against contracting debts as to express rather a consequence of any such act than a distinct prohibition against altering the succession." [1] "If," said Lord Brougham, "you only state burdening with debt or altering the order of succession as consequent on the act of selling, or disponing, or alienating, when you are principally and substantively dealing therewith, that will have no effect against those acts; it is not enough to say, 'He, my heir of entail, shall not sell, whereby the estate may be incumbered or evicted, or the future succession defeated.' . . . Here the fact of altering the order of succession is only brought in consequentially, and under the cover of the other, as connected with and arising out of it." [2]

Analysis of the cases on the third prohibition. Prohibition of deeds "in prejudice of the foresaid tailzie."

925. The passages cited from the opinions delivered in the *Overton* case sufficiently explain the rule of construction applicable to merely expletive clauses, following the two primary prohibitions, and pointing to the frustration of the course of succession as a consequence of the contravention of those prohibitions. The citations given in the note to the last paragraph will facilitate the comparison of the clauses in the various entails which have been held to fall within the rule of criticism laid down in that case. It is

[1] M'L. & Rob. 891.

[2] We subjoin a list of the cases in which entails have been found defective in the prohibitions against altering the succession, with examples of the expletive words alleged to be equivalent to such prohibitions:—*Stewart* v. *Home* (Argaty), 1789, M. 15,535; "Or grant any deeds whatsoever, whereby these lands, or any part of them, may or can be evicted by adjudication or otherwise." *Brown* v. *Countess of Dalhousie* (Eastfield), 25 May 1808, M. "Tailzie," App. No. 19; "Nor do any other deed whereby the said lands and others foresaid, or any part thereof, may be apprised, adjudged, or any manner of way evicted in prejudice of this present tailzie, or of those who, by virtue thereof, shall be then to succeed." *Purves' Trs.* v. *Campbell* (Purves and Lambden), 7 June 1814, Hume, 873; *Henderson* v. *Henderson* (Earlshall), 21 Nov. 1815, F.C., cited *supra*, note 4; *Forbes* v. *Forbes* (Craigievar), 22 Feb. 1816, Duncan's Digest, p. 99; *Oliphant* v. *Oliphant* (Ardblair), 7 June 1816, F.C.; *Dickson* v. *M'Donald* (Blairhall), 6 July 1816, Duncan's Digest, p. 102. *Grant* v. *Tytler* (Burdsyards), 9 March 1826, F.C.; "Or to do any act, civil or criminal, that shall be the ground or foundation of any adjudication, eviction, or forfeiture of the said lands and estate, or any part thereof, or which may anyways affect or burden the same." *Gilmour* v. *Cadell* (Liberton), 5 July 1838, 16 Sh. 1261; "Or doe any other deed whereby the said lands, baronies, and others, or any pairt thereof, may be comprised, adjudged, or otherways evicted or forfaulted, in prejudice of this present tailzie, or any designation which shall hereafter be made by me, and these who are to succeed be vertue of the samen." *Braimer* v. *Bethune* (Balfour), 18 Jan. 1839, 1 D. 383. *Lang* v. *Lang* (Overton), 23 Nov. 1838, 1 D. 98; 16 Aug. 1839, M'L. & Rob. 871; "Nor do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded." *Trotter's Trs.* v. *Gordon* (Mortonhall), 10 March 1840, 2 D. 826. *Elphinstone* v. *Burnett* (Durno and Hunthall), 6 March 1850, 12 D. 848; "Or doe any deed whereby the samen, or any pairt thereof, may be apprysed, adjudged, or otherwise evicted, in prejudice of any other heirs-substitutes who by this present tailzie may succeed."

proper to add, that general words of prohibition applicable to deeds "in prejudice of the foresaid tailzie and *succession*,"[1] or "in prejudice of the said *tailzie*, and of the *persons* above mentioned,[2] are held to satisfy the requirement of the Statute, provided the "deeds" mentioned in the clause are not classed with those which may be the ground of adjudication or eviction, but are clearly disjoined from the subject-matter of the antecedent prohibitions.

Effect of omission to fence the third prohibition.

926. The question whether a deed or instrument of a given description falls within the scope of a particular prohibition had lately acquired a special interest in relation to the prohibition against altering the succession, since upon its solution depended the question of the efficacy of such prohibitions without the accompaniment of irritant and resolutive clauses. It was commonly affirmed that a simple prohibition against altering the order of succession is binding *inter hæredes;* and if this be true universally (so as to comprehend the heirs of provision under a marriage-contract), such a prohibition, although unfenced, would be effectual for all purposes, because all questions upon alterations of the order of succession are questions *inter hæredes*. The case of *Carrick* v. *Buchanan* settled that a simple prohibition to alter the order of the succession was effectual at common law against gratuitous deeds.[3] Deeds in favour of creditors are not regarded as deeds altering the succession.[4] In the *Duke of Hamilton's* case[5] it was decided or assumed, as a consequence of the Entail Amendment Act, section 47, that unfenced prohibitions against the alteration of the order of succession are no longer effectual *inter hæredes*, and so the controversy is closed.

SECTION II.

Of the Irritant and Resolutive Clauses.

Division of subject: 1. Irritant clause; 2. Resolutive clause; 3. Application.

927. In this section we have to consider, first, what is requisite to the frame of irritant and resolutive clauses; and secondly, the application of the irritant and resolutive clauses to the three

[1] *Innes* v. *Ker* (Roxburghe case), 1807, M. "Tailzie," App. No. 13; 8 June 1811, 5 Pat. 361.

[2] *Campbell* v. *Buchan and Monypenny* (Strathbrock case), 16 Aug. 1839, M'L. & Rob. 898; unreported in C. of S.; but see the previous case on the same entail,—*Rowe* v. *Monypenny*, 9 Feb. 1837, 15 Sh. 500.

[3] *Carrick* v. *Buchanan* (Burnhead), 5 Sept. 1844, 3 Bell, 342; and see *Lady Dalhousie's* case, M. "Tailzie," App. No. 19.

[4] *Syme* v. *Dickson* (Blairhall), 3 March 1821, F.C., and cases cited in *Lindsey* v. *Oswald*, 5 Macph. (H.L.) 12, Law Rep. 1 Sc. App. 99.

[5] *Hamilton* v. *Duke of Hamilton*, 1870, 8 Macph. (H.L.) 48; Compare Sir George Mackenzie on Entails, vol. 2, pp. 487-8.

statutory prohibitions. It is in the application of the fettering clauses that those errors have most frequently occurred which made this branch of the law so productive of litigation, and which, from the great number of reported cases that have to be dealt with, render the subject peculiarly embarrassing to the systematic writer. In the introductory part of the preceding section reference has been made to some general rules of criticism applicable to all the restraining clauses of deeds of entail. We have seen that the clauses must designate precisely the estate, and also the persons (including the institute) to which they are intended to be applied;"[1] and that an estate cannot be subjected to the fetters of a strict entail by a mere reference to and adoption of the restraining clauses contained in a prior deed.[2] It is unnecessary to repeat what has been said on these topics, or on the subject of the rules of construction applicable to erasures and omissions in the restraining clauses.

Object of the clause: effect of omissions.

928. I. IRRITANT CLAUSE.—The object of the irritant clause is to declare that acts and deeds in contravention of any of the prohibitions are null and void against the estate. Erasures or omissions in this clause are therefore fatal wherever their effect is to leave a blank either in the words denoting the things annulled or in the words declaring the nullity. Of the former class was the omission in the *Hoddam* case,[3] where the words which should have stood as a nominative to "shall be of no force, strength, or effect" had been omitted by the writer, and it was proposed to fill up the blank by supplying the words "debts, deeds, and acts" from the introductory part of the clause. This, for obvious reasons, was held by the House of Lords to be inadmissible, and contrary to the principles of strict construction. With respect to deeds of entail defective by reason of their not containing any effectual irritancy or declaration of nullity, it is sufficient to refer the reader to the reported cases.[4]

Irritancy may be constituted by any words annulling the contravention.

929. The words "null and void" are not essential to an irritancy, and they may be replaced by any expression of equivalent import, such as "invalid and ineffectual," or "of no force, strength, or effect."[5] The irritancy required by the Statute is a declaration

[1] *Wauchope* v. *Wauchope*, 1834, 11 M. 424, where a resolutive clause was found to be defective because it was not applied to heirs descended of the entailer's body.

[2] Section I., *supra*.

[3] *Sharpe* v. *Sharpe*, 3 July 1832, 10 Sh. 747; 18 April 1835, 1 S. & M'L. 594. *Henderson* v. *Henderson*, 21 Nov. 1815, F.C., where there is no mention of deeds *in contravention* of the entail in the irritant clause.

[4] *Baillie* v. *Carmichael*, 1734, M. 15,500; *Gairdner* v. *Heirs of Dunnipace*, 1744, M. 15,501; *Kempt* v. *Watt*, 1779, M. 15,528. See the clauses quoted in Duncan's Digest, pp. 119-121.

[5] *Lindsay* v. *Earl of Aboyne*, and *Adam* v. *Farquharson*, *infra*. See observations in the former case by Lord Campbell, 3 Bell, 292.

of nullity of the acts of contravention *as affecting the estate*, not intrinsic nullity, or nullity against the contravener.[1] A declaration of nullity as against the heirs of entail is sometimes conjoined with an irritancy applicable to the estate, in which case the reference to the heirs is rejected as surplusage, and it is immaterial that the institute is not mentioned.[2]

Resolutive clause must declare forfeiture of the estate and devolution to next heir.

930. II. RESOLUTIVE CLUASE.—The object of the resolutive clause is to declare the forfeiture of the right of the person contravening any of the prohibitions or other conditions of the entail, and the devolution of the succession to the next heir-substitute.[3] According to the usual style, the person contravening is said to "forfeit, amit, and lose" his right and interest, and the estate is declared to "fall and belong" to his successor. None of these words are essential. The word "irritate" has been held equivalent to "forfeit," when used in a resolutive clause.[4] According to the terms of the Statute, it would appear that the two things must be expressed—the forfeiture of the contravener's right and the devolution of the estate.[5] As regards the contravener, the forfeiture may either be for himself only, or for himself and his descendants; and the descendants of a contravening heir are entitled to succeed in the case of a forfeiture, unless their right is expressly barred by the terms of the resolutive clause. The declaration, sometimes added, that the next heir making up a title shall take the estate without being affected by the contraventions, is surplusage, and omissions in such a declaration are immaterial.[6]

Classification of restraining clauses according to their structure.

931. III. APPLICATION OF THE IRRITANT AND RESOLUTIVE CLAUSES.—Irritant and resolutive clauses are either independent and complete in themselves, or are connected with the prohibitory clause by introductory phraseology common to both. Of the former class is that description of irritant clauses which follows in imme-

[1] *Munro* v. *Munro*, 15 Feb. 1826, 4 Sh. 467, N.E. 472; see Lord Balgray's opinion; affirmed 25 July 1828, 3 W. & S. 344. In *Gibson* v. *Gibson*, 1869, 7 M. 791, the irritant clause was held insufficient because directed only against the heirs of entail.

[2] *Lindsay* v. *Earl of Aboyne*, 2 March 1842, 4 D. 843; 5 Sept. 1844, 3 Bell, 254, see p. 292. *Adam* v. *Farquharson*, 18 June 1840, 2 D. 1162; 5 Sept. 1844, 3 Bell, 295.

[3] Several cases occur in the older reports in which deeds of entail have been found ineffectual by reason of their containing no resolutive clause. These do not raise any question of construction. The case of *Mitchelson* v. *Atkinson*, 15 June 1831, 9 Sh. 741, is of this class.

[4] *Anstruther* v. *Anstruther*, 26 Nov. 1840, 3 D. 142; and see *Borthwick* v. *Glassford*, 15 Nov. 1853, 16 D. 37. In the case of *Eliott* of Stobs, the word "amit" was alone used, and the resolutive clause was sustained,—1803, M. 15,542.

[5] The latter alone was held insufficient in *Hepburn* v. *Hepburn*, 1758, M. 15,507; 6 Dec. 1758, 2 Pat. 17; and *Welsh* v. *Robertson*, 13 June 1820, unreported; see the clauses in Duncan's Digest, pp. 149 and 169.

[6] *Borthwick* v. *Glassford*, 9 Nov. 1853, 16 D. 37.

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diate sequence to the last prohibition, and commences with the words, "all which acts, deeds," &c. Where the irritant clause is framed in this way, the resolutive clause which follows is always independent of it by construction, and will often be found to be accurately applied to all the prohibitions, while the irritant clause is, by its words of reference, applicable only to the last member of the clause of prohibition. Where the irritant and resolutive clauses are connected in construction, they are usually preceded by introductory words, such as "In case the said A. B., or any of the heirs of tailzie, shall contravene any of the before-written conditions, restrictions, &c., either by failing," &c. Here the extent of the application of both clauses is dependent on the force of the introductory words; and where these do not bear reference to *all* the prohibitions, the entail is defective alike in the irritant and in the resolutive clauses. Clauses framed in this way, if the introductory words contain an enumeration of the acts of contravention to which they are applied, are said to be framed "on the principle of enumeration;" otherwise, they are said to be framed "on the principle of reference." It is not essential that the prohibitions should be referred to by their proper general name; the most usual words of reference are "conditions, provisions, restrictions, and limitations," and any of these terms would be held to include the statutory prohibitions if the context admitted of that construction.[1] The use of the word "other," in connection with "conditions," &c., does not detract from the generality of the reference.[2]

Irritant clause commencing with words "all which," "all such:" antecedent found in prohibition against contracting debt.

932. (1.) *Where the irritant clause is immediately connected with the prohibitory clause by the words "all which" or "all such;"—e.g.,* "All which acts and deeds prohibited as aforesaid are hereby declared to be null and void."—In this style of clause the acts of contravention proposed to be annulled are indicated by the relative "which" or "such," the antecedent being found in the prohibitory clauses. Where the words agreeing with "which" or "such" have no special antecedent in any of the prohibitory clauses, they are taken to apply generally to the whole prohibitions, and the irritancy is good. On this principle, the expression "all which debts, *facts*, and deeds are by these presents declared to be void and null" was sustained as an irritancy satisfying the Statute. The word "facts" did not occur in the phraseology of the prohibitory clauses. The expression "all which facts" was therefore held to apply to all facts of the prohibited description,—facts of alienation, of debt

[1] In *M'Donald* v. *M'Donald*, 1875, 2 R. (H.L.) 28, "conditions and provisions" were held to be a sufficient reference to or description of the prohibitory clauses.

[2] *Stirling* v. *Moray*, 28 May 1845, 7 D. 640; *M'Donald* v. *M'Donald*, *supra*.

contracted, or of alteration of the succession.[1] And an irritant clause annulling "all such deeds" was sustained as perfectly comprehensive.[2] But where there is contained in the immediately antecedent member of *the prohibitory clause* (usually in connection with the prohibition against contracting debts) a reference to "debts and deeds, whereby the estate may be adjudged or evicted," and this is followed by an irritancy of "all such" or "all which debts and deeds," the debts and deeds specially mentioned in the prohibitory clause are held to constitute the proper antecedent to the corresponding words of relation in the irritant clause, the operation of which is thus confined to such debts and deeds as may be made the ground of adjudication.[3] On this principle of construction the entails of the estates mentioned in the preceding note were held to be defective in the irritant clause. To these we may add the often cited case of the *Overton* entail,[4] in which this particular rule of construction was first established, and which, although properly belonging to the second group of cases, differs from the foregoing only by containing the introductory words, "and if they shall do in the contrary."

Relative "which" or "such" followed by an enumeration of modes of contravention.

933. Where the words of reference in the irritant clause take the form of a specification of different *modes* of contravention, it would appear that the clause is defective if the specified modes of contravention are not so comprehensive as to apply in fair construction to all the prohibitions. Thus an irritancy of "all which rights and dispositions, wadsets, bonds, and other writs," was held not to apply to adjudication or other real diligence against the estate for personal debts;[5] and in a more recent case a similar enumeration was held not to apply to contraventions of the prohibition against altering the succession.[6]

934. (2.) *Where the irritant and resolutive clauses are preceded*

[1] *Hay* v. *Hay* (Rannes), 20 Dec. 1842, 5 D. 347.

[2] *Malcolm* v. *Kirk*, 1873, 11 M. 722. See a very similar case, *Wallace* v. *Wallace*, 1880, 7 R. 902, where Lord Moncreiff described the *Overton* case as the culmination of what was called the strict construction of entails, and declined to proceed further in the same direction.

[3] *Graham* v. *Murray* (Balgowan), 21 Jan. 1848, 10 D. 380; 3 May 1849, 6 Bell, 441; *Barclay* v. *Adam*, 18 May 1821, 1 Sh. (App. Ca.) 24; *Sinclair* v. *Sinclair* (Ulbster), 26 Feb. 1841, 3 D. 636; *Baillie* v. *Baillie* (Mellerstain), 12 July 1850, 12 D. 1220.

[4] *Lang* v. *Lang*, 23 Nov. 1838, 1 D. 98; 16 Aug. 1839, M'L. & Rob. 871.

[5] *Welsh* v. *Robertson*, 13 June 1820, Duncan's Digest, p. 168.

[6] *Cunyngham* v. *Cunyngham* (Prestonfield), 9 March 1852, 14 D. 636. In *Dewar* v. *Dewar*, 20 July 1852, 14 D. 1062, there was a similar irritancy of dispositions, wadsets, &c., "and other deeds of contravention," but the prohibition against altering the succession was brought in at a subsequent part of the deed, and it was held that the irritant clause did not apply to it. This form of clause was the subject of discussion in the *Kintore* case, as to which see § 935, *infra*.

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Irritancy framed as a substantive clause, and on the principle of reference.

by introductory words framed on the principle of reference.—The group of cases falling within this description differs from the last chiefly in the circumstance that the declaration of nullity is preceded by the words "in case the said heirs shall contravene," &c., or some equivalent phraseology. The reported cases are numerous, but they may all be reduced to a few general rules, which are similar in substance to those we have considered in relation to the first group.

Irritancy of all "debts and deeds," or "deeds and acts" in contravention, held good. Cases of *Lumsden* and *Kintore*.

935. Where the construction is unembarrassed by the use of the relatives "which" or "such," an irritant clause framed on the principle of reference is good. This rule is exemplified by the leading case of *Lumsden* v. *Lumsden*, where the words "and all the debts and deeds of the said heirs of tailzie, or any of them, . . . in contravention of this present entail, . . . shall not only be void and null," were held to satisfy the requirements of the Statute.[1] In the case of the *Kintore* entail[2] (which deserves to be studied for the just and comprehensive principles of criticism enunciated by Lords Westbury and Chelmsford), the irritant clause declared that if the heirs should contravene the premises, then and in that case all the said venditions, alienations, &c., "and all other crimes, treasons, deeds, and acts done in the contrary of this present taillie and provision, shall be null and void." This clause, it will be observed, is not framed on the principle of enumeration of the things contained in the prohibitory clause; for the words of specification are general words descriptive of modes by which any prohibited things might be accomplished, concluding with the *nomen generalissimum* "deeds and acts."[3] The entail was therefore without difficulty sustained both in the Court of Session and on appeal.

Distinction where the words "deeds," &c., are preceded by the relatives "such" or "said."

936. On the other hand, where the words descriptive of the mode of contravention are preceded by the relatives "such" and "said," the rules of construction stated with reference to the first group of cases are applicable. The words "facts" and "acts" are general words of reference, and either of these, although coupled with "debts and deeds," suffices to impart to the phrase in which

[1] *Lumsden* v. *Lumsden* (Auchindoir), 26 Nov. 1840, 3 D. 136; 18 Aug. 1843, 2 Bell, 104. Also *Earl of Buchan* v. *Erskine*, 23 June 1842, 4 D. 1430, 1435; 21 Feb. 1845, 4 Bell, 22; *Lawrie* v. *Lawrie*, 13 Dec. 1854, 17 D. 181, where the clause ran, "All deeds, debts, and acts contracted, granted, done, or committed contrary to the foresaid conditions, &c., . . . shall be absolutely void and null;" and the earlier case of *Lord Elibank* v. *Campbell*, 21 Nov. 1833, 12 Sh. 74; *Hamilton* v. *Lindsey-Bucknell*, 1869, 8 M. 323; *Drummond* v. *Hay*, 1872, 10 M. 451. In all these cases the entails were sustained.

[2] *Earl of Kintore* v. *Lord Inverury* (Kintore case), 18 June 1861, 23 D. 1105; 16 April 1863, 4 Macq. 520.

[3] See the observations of Lords Wensleydale and Chelmsford on this point, 4 Macq. 528, 531.

it occurs the quality of relation to all the particular things contained in the prohibitory clause.[1] The adjection of expletive words to the declaration of nullity, *e.g.*, "sicklike as if the same had never been made," does not detract from the generality of the antecedent words of reference.[2] Nor is it to be inferred that the contraction of debt is expected from the "acts and deeds," which are the subject of the irritancy, merely because debts are specially mentioned in the subsequent resolutive clause.[3]

Lady Hawarden's case.

937. The case of *Lord Wharncliffe* v. *Nairne*,[4] is a very interesting and critical illustration of the principle of construction under consideration. The entail prohibited, first, alienation, secondly, the construction of debt, or "any other *fact and deed* whereby the said lands and others foresaid may be apprised or adjudged;" thirdly, alteration of the succession. The irritant clause provided that in case of contravention "in any point of the premises," all such *debts, facts, and deeds* should be null and void "in so far as the samen might infer any actions, personal or real, against the next heir of taillie, or the lands and others foresaid." Here the words "debts, facts, and deeds," used as words of reference in the irritant clause, are identical with those employed in the clause prohibiting the contraction of debt; but because that clause is not immediately antecedent to the irritancy, but is separated from it by the clause prohibiting the alteration of the succession, and because the reference is express to contravention "in any point of the premises," it was found that the declaration of nullity was applicable to all the prohibitions.[5] But inasmuch as that declaration was subsequently restricted to matters *inferring actions real or personal*, the irritancy was held not to apply to voluntary sales, which did not require to be followed by an action for implement, and to that extent only the irritancy was held bad.[6]

Wharncliffe v. *Nairne*.

[1] *Maxwell* v. *Maxwell*, 24 Feb. 1852, 14 D. 537; *Baird Preston* (Valleyfield case), 28 Jan. 1845, 7 D. 305; *Dingwall* v. *Dingwall* (Rainnieston), 26 Feb. 1842, 4 D. 1816; 17 April 1845, 4 Bell, 149; *Gilmour* v. *Gordon* (Craigmillar), 24 March 1853, 15 D. 587, where the words "facts and deeds" had for their antecedent "act and do in the contrary;" *Maxwell* v. *Smith* (Merksworth), 29 June 1860, 22 D. 1341; *Howden* (*Rocheid's Tr.*) v. *Rocheid*, July 16, 1869, 7 Macph. (H.L.) 111, affg. 6 M. 300, where the words "facts, deeds, &c., . . . done or contracted," were held to comprise written instruments.

[2] *Lady Hawarden* v. *Dunlop* (Wigton), 3 Macph. 748; 12 June 1866 (*nom. Howden* v. *Fleeming*), L.R. 1 Sc. Ap. 40.

[3] *M'Grigor* v. *Hamilton* (Bardowie), 26 Feb. 1845, 7 D. 532.

[4] *Lord Wharncliffe* v. *Nairne* (Drumkilbo), 13 Nov. 1849, 12 D. 1; 5 July 1850, 7 Bell, 132.

[5] See Lord Brougham's speech, 7 Bell, 139.

[6] On the point of the construction of the words of reference, this case was held to be ruled by that of *Jordanstone* (*Knight* v. *Knight*, 1 Dec. 1842, 5 D. 221). In that case the irritant clause in the case of contravention "in any part of the premises" annulled "all such debts and deeds," and the prohibition applicable to debts and deeds was not immediately antecedent to the irritancy, which was accordingly held good.

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Irritancy by reference bad, where correlative expressions found in last prohibition. *Overton* case.

938. Again, where the irritant clause is framed on the principle of reference, and the words in agreement with "such" are "debts and deeds" merely,—those being also the words employed in the prohibition against the contraction of debt, and that prohibition being the immediate antecedent of the irritant clause,—then the irritancy is held bad, as being applicable only to the antecedent prohibition against the contraction of debt.[1] And a reference to dispositions, alienations, and other modes of contravention is bad, unless the enumerated modes of contravention are, on a fair construction, applicable to all the matters embraced in the three prohibitions.[2]

939. It is not necessary that the resolutive clause should echo the phraseology of the irritant clause. So, where a deed of entail annulled contraventions of the conditions, provisions, *restrictions, and limitations* of the entail, and the resolutive clause was expressed with reference only to conditions and provisions, the entail was held good, as it did not appear that the entailer attached any distinctive meaning to the words in italics.[3]

THREE MODES: 1. General words followed by incomplete enumeration bad; 2. Such enumeration followed by general words (not of reference) bad.

940. (3.) *Where the irritant and resolutive clauses are framed on the principle of enumeration.*—If to a prohibitory clause, specifying various things that are prohibited, there be added an irritant or resolutive clause, which, beginning with general words (even of reference), proceeds to particularise or enumerate some only of the things prohibited, then the concluding words of the clause, declaring the irritancy or forfeiture, are in construction confined to the things specified or enumerated. If, again, to a prohibitory clause, consisting of various prohibitions, there be added an irritant or resolutive clause, which makes a repetition of some of the things prohibited, and concludes with general words, *not being words of reference*, the general words are confined in their extent, and reduced to signify things *ejusdem generis* with those that are denoted by the special expressions. In either of these cases the clause fails upon the principle of defective enumeration.[4] Irritant and resolutive clauses framed on the principle of enumeration most usually begin with some such expression as, "In case any of the heirs of tailzie shall contravene or fail in performing any part of the premises," and the various acts of contravention are introduced

[1] *Lang* v. *Lang*, (Overton), 23 Nov. 1838, 1 D. 98; 16 Aug. 1839, M'L. & Rob. 871; *Udny* v. *Udny*, 16 March 1858, 20 D. 796; *Hay* v. *Hay* (Seggieden), 11 March 1851, 13 D. 945, where the words "such deeds" in the irritant clause were held to bear relation to the deeds mentioned in the immediately antecedent prohibition.

[2] *Cunyngham* v. *Cunyngham* (Prestonfield), 9 March 1852, 14 D. 636.

[3] *Howden* (*Rocheid's Tr.*) v. *Rocheid*, 1869, 7 Macph. (H.L.) 110; affirming 6 Macph. 300.

[4] Per Lord Chancellor Westbury in *Earl of Kintore* v. *Lord Inverury*, 4 Macq. 522.

by the words "particularly,"[1] "either by,"[2] or "with respect to."[3] The construction of the clause is not affected by the terms employed to connect the general with the particular words of reference.

3. Incomplete enumeration followed by general words of reference good. Cases of *Haulkerton* and *Balliliesk.*

941. Where an irritant or resolutive clause, after enumerating some of the things prohibited, concludes with general words, *being words of reference*, such general words are equivalent to a repetition of the things so referred to, and the effect is the same as if everything prohibited, which is not enumerated in the first part of the clause, had been expressly mentioned in the concluding part of it. Such is the principle on which the judgment in the case of the *Haulkerton* entail[4] was affirmed in the House of Lords. The principle appears to be sound; but, as a rule of construction, it is attended with this inconvenience, that it commits to the unaided discretion of the judge the determination of the question whether the concluding general words, on which the validity of the entail is to hinge, are or are not words of reference. In the *Haulkerton* case, the general words, "in any one of the several particulars above mentioned" (following a specification of particulars), were held to be words of reference, and so to have the effect of importing contravention by alienation into the enumeration of the acts to be annulled. But according to the previous decisions this effect was denied to words of nearly equivalent import. Thus, in the *Balliliesk* case,[5] the words "or shall contravene or fail in any part of the premises," following an enumeration, were not allowed to extend the clause beyond the particulars previously enumerated, and it must be confessed, as observed by Lord Chelmsford,[6] that it is difficult to reconcile the decisions.

What is held to be a complete enumeration.

942. Where an irritant or resolutive clause beginning with general words of reference is followed by a complete enumeration of the acts prohibited, there can be no objection to its validity.[7]

[1] *Horne* v. *Rennie* (Balliliesk case), 17 Jan. 1837, 15 Sh. 372, 13 March 1838, 3 S. & M'L. 142; *Thomson* v. *Milne*, 27 Feb. 1839, 1 D. 592; *Glen* v. *M'Turk*, 23 Jan. 1852, 14 D. 359.

[2] *Bruce* v. *Bruce* (Tillicoultry case), 1799, M. 15,539; 18 June 1801, 4 Pat. 231; *Hamilton* v. *Duke of Hamilton*, 1870, 8 Macph. (H.L.) 48; and many others.

[3] *Cuningham* v. *Fairlie*, 3 March 1857, 19 D. 596; 28 March 1860, 22 D. (H.L. Ca.) 8; *Earl of Kintore* v. *Lord Inverury* (Haulkerton case), 16 April 1863, 4 Macq. 521.

[4] *Earl of Kintore* v. *Lord Inverury*, 18 June 1861, 23 D. 1118; 16 April 1863, 4 Macq. 520.

[5] *Horne* v. *Rennie*, 13 March 1838, 3 S. & M'L. 142; followed on this point by *Thomson* v. *Milne*, 27 Feb. 1839, 1 D. 592; and *Glen* v. *M'Turk*, 23 Jan. 1852, 14 D. 359. In other cases, the concluding words "commit any other fact or deed whereby," &c., were held to be merely expletive; see *Cunningham* v. *Scott Moncrieff*, 20 July 1804, 4 Pat. 652; *Menzies* v. *Menzies*, 18 Feb. 1852, 14 D. 522, and and many others.

[6] 4 Macq. 534.

[7] *Renton* v. *Munro* (Poyntzfield), 19 July 1843, 5 D. 1419; *Eliott of Stobs*, 1803, M. 15,542; *Dewar* v. *Burden*, 26 Nov. 1845, 8 D. 90; 25 March 1850, 7 Bell, 32; *Ogilvy* v. *Ogilvy*, 1874, 1 R. 450; *Speirs* v. *Speirs' Trs*, 1878, 5 R. 923.

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If the three cardinal prohibitions are specified in adequate terms, the introduction or omission of collateral matters will not derogate from the force of an enumeration which is otherwise sufficient;[1] and the words "facts," "debts and deeds," &c., of the irritant clause, will in construction be held to relate to the whole of the acts of contravention which are enumerated.[2] But where a clause framed on the principle of enumeration repeated all the prohibitions, and then annulled all "*the said* conditions, alienations," and other things (omitting debts), the prohibition against contracting debt was found not to be validly fenced.[3]

Cases classed according to the unfenced prohibitions.

943. For convenience of reference, we annex in a note a list of entail cases in which the irritant and resolutive clauses have been held bad on the principle of defective enumeration, classified according to the prohibitions which were found to be insufficiently fenced.[4]

SECTION III.

Of the other Solemnities required by the Act 1685.

(1.) *Insertion of Restraining Clauses in Titles.* (2.) *Recording the Entail.* (3.) *Of Entails standing on Personal Titles.*

Statutory requisites: 1. Insertion of clauses in titles; 2. Recording of entail.

944. The statutory requisites to which this section relates are directed to the object of publication. They are, as interpreted by the decisions—1*st*, that the prohibitory, irritant, and resolutive clauses be inserted *verbatim* in all charters and sasines or other instruments of investiture, and that they be inserted (either *verbatim* or by reference to a previous transcript contained in the deed) in the procuratories of resignation and precepts of sasine of the actual entail and of all subsequent deeds of transmission;[5] 2*dly*, that the deed of

[1] See the cases cited in the preceding note, and *Anstruther* v. *Anstruther*, 26 Nov. 1840, 3 D. 142, where an irritant clause which annulled contraventions by altering the succession, selling, alienating, or burdening the lands, was sustained, though it did not apply to *wadsetting or feuing*.

[2] *Lockhart* v. *Lockhart* (Castlehill), 20 May 1841, 3 D. 904; *Murray* v. *Murray* (Cockspow), 4 Sept. 1844, 3 Bell, 100.

[3] *Lord Duffus' Tr.* v. *Dunbar*, 28 Jan. 1842, 4 D. 523; *Martin* v. *Dunbar*, 17 July 1844, 6 D. 1320.

[4] *Enumeration not including alienation.*—*Thomson* v. *Milne*, 1 D. 592; *Glen* v. *M'Turk*, 14 D. 359; *Bruce* v. *Bruce*, 4 Pat. 231; *Cunningham* v. *Scott Moncrieff*, 4 Pat. 652; *E. of Caithness* v. *Lord Berriedale*, 8 D. 553; *Menzies* v. *Menzies*, 14 D. 522; *Sinclair* v. *Sinclair*, 3 D. 636; *Baillie* v. *Baillie*, 12 D. 1220.

Enumeration not including Contraction of Debt.—*Lord Duffus' Tr.* v. *Dunbar*, 4 D. 523; 6 D. 1320; *Henderson* v. *Henderson*, 21 Nov. 1815, F.C.; *Welsh* v. *Robertson*, Duncan's Digest, p. 168; *Baillie* v. *Baillie*, 12 D. 1220.

Enumeration not including Alteration of the Succession.—*Ferguson* v. *Ferguson*, 15 D. 19; *Scott* v. *Scott*, 18 D. 168; *Lord Rollo* v. *Rollo*, 3 Macph. 78; *Hamilton* v. *Duke of Hamilton*, 1870, 8 M. (H.L.) 48.

[5] See the Conveyancing Statutes of

entail shall be recorded under the authority of the Court of Session in a special register called the Register of Tailzies.[1] On compliance with the required conditions, the entail is, by the Statute 1685, declared to be real and effectual, not only against contraveners and their heirs, but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles. The omission to insert the clauses in the subsequent titles upon which the estate is possessed is declared to import a contravention devolving the estate to the next heir;[2] but not to militate against creditors and singular successors contracting *bona fide* with persons infeft on such defective titles.

Object of these requirements.

945. The requirements of the Statute are well adapted to the objects of preserving the rights of the heirs-substitute, and giving notice to purchasers from and creditors of the heir in possession. The insertion of the clauses of the entail in the infeftments is necessary to prevent the fetters being worked off by prescriptive possession on an unlimited title, and also to give notice to strangers contracting with the heir in possession on the security of the records. The registration of the entail in the Register of Tailzies limits the personal right of heirs possessing on apparency, while it also serves the purpose of an authentic record of the essential parts of the entail in the event of the original deed being destroyed.

Effect of omission to take infeftment on entail where heir completes a separate feudal title.

946. I. INSERTION OF CLAUSES IN TITLES.—Since the Statute provides that, on the conditions and restraining clauses "being so insert," the entail shall be effectual against creditors and singular successors, it follows, as a necessary consequence, that if an entail has never been completed by infeftment, and the heir takes infeftment upon a separate title, his creditors and singular successors are not bound by the entail. The same consequence ensues where the entail has never been recorded, and the heir is infeft upon an inde-

1868 and 1874, which simplify the mode of complying with this requirement of the Act 1685.

[1] The words of the Statute are:—"It is always declared that such tailzies shall only be allowed in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine; and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpone their authority thereto, and that a record be made in a particular register book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the aires of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam*, . . . and which provisions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the aires of tailzie." —Stat. 1685, cap. 22.

[2] The validity of an entail was held not to be affected by omissions in the title of the institute, the title of the heir in possession not being defective in this respect, —*Hamilton* v. *Lindsey-Bucknell*, 1869, 8 Macph. 324.

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pendent title, examples of which are cited in the second part of this section. Where the possession of the heir stands on a personal title, a different principle comes into operation, as will be explained in the sequel.

Under the Statute, a reference to dispositive clause held equivalent to *verbatim* insertion in other clauses.

947. It had long been settled[1] that, where the deed of entail contained a procuratory and a precept, the Statute was satisfied by the insertion of the clauses in the procuratory, and a reference to them as so inserted in the subjoined precept; for, says the report, by an equitable construction all the clauses in the same deed are understood to be inserted in every part of the deed.[2] Upon this principle it was afterwards ruled to be sufficient to refer, in the procuratory and the precept, to the conditions and restrictions as set forth in the dispositive clause.[3] These decisions would necessarily rule the question as to the necessity of double transcription in renewals of the investiture; but, as already seen, the necessity of engrossment in such instruments has been superseded by statute;[4] and in modern conveyances, by way of registered disposition, a simple reference in the dispositive clause to the conditions of the recorded entail is the only intimation required. As to instruments of transmission and infeftments anterior to the Conveyancing Statutes, it is sufficient to observe that each writ forming a part of the feudal progress must have contained the clauses in question at length.[5]

Reference to prior entail bad under the Statute.

948. We have already had occasion to examine the authorities which prove that an entail is invalid when the restraining clauses are not set forth in the actual deed of entail, but are merely referred to as existing in a prior settlement.[6]

Material variances in the transcription of the clauses equivalent to omission to insert.

949. Any material variance between the transcription of the conditions and restraining clauses in the title of the heir in possession and the clauses of the actual entail was held to be equivalent to a failure to insert the clauses, which left the estate open, in terms of the Act 1685, to adjudication for the debts of the heir in possession.[7] The entail, however, was held to subsist *quoad* the residue of the estate; and even where possession was had for the prescriptive period upon a defective investiture, which referred to the deed of entail as the title of possession, the heirs were held to be bound to make up titles in terms of the entail; and lands acquired in excambion, under the Montgomery and Rosebery Acts, were held to

[1] *Murray* v. *Kynnynmound*, 1744, M. 15,380; *Porterfield* v. *Corbett*, 10 Dec. 1841, 4 D. 234.

[2] M. 15,380.

[3] *Earl of Buchan* v. *Erskine*, 23 June 1842, 4 D. 1430; 21 Feb. 1845, 4 Bell, 22.

[4] Titles Acts, 1868 and 1874.

[5] *Viscount of Garnock* v. *Heirs of Entail*, 1725, M. 15,596; *Murray* v. *Kynnynmound*, *supra*.

[6] *Supra*, Section I.

[7] *Holmes and Campbell* v. *Cuninghame*, 13 Feb. 1851, 13 D. 689.

be secured against being carried away by diligence by words of reference in the contract to the clauses of the deed of entail.[1]

What held to be a material variance or discrepancy.

950. What is to be held a material discrepancy is a question of construction as to which no general rule can be laid down. In *Holmes* v. *Cuninghame*,[2] omissions in the recital of a resolutive clause were held to be material, although the words actually inserted were sufficient to constitute an effectual resolutive clause. The destination (which exists inferentially in every restraining clause) is obviously a material point, yet the omission of the words "of the body" in the recital of a destination to "heirs whatsoever of the body," was held immaterial in *Stirling* v. *Moray*,[3] on the ground that "heirs whatsoever" in the charter was a flexible expression which fell to be construed by the terms of the entail upon which it proceeded. The omission of the word "irritant" in the notary's narrative, which stated that he gave sasine subject to the clauses prohibitory and resolutive, was held immaterial.[4] Under the 43d section of the Entail Amendment Act,[5] entails which are invalid in regard to the prohibitions, by reason of defects in the investiture, are to be deemed invalid as regards all the prohibitions. This provision offers a strong temptation to the fabrication of erasures in charters; but as these documents are usually in the hands of professional agents, there is not practically much danger, and in fact there are only three cases reported since the Act in which entails have been challenged on the ground of defects in the investiture.

Procedure in application for authority to record.

951. II. REGISTRATION OF THE ENTAIL.—The Statute requires, as a condition of the entail being binding upon singular successors, that it be produced to the Court of Session, that their authority be interponed to it, and that it be recorded in a register kept for the purpose.[6] This is accomplished by presenting a petition to the

[1] *Cuninghame's Trs.* v. *Cuninghame*, 20 July 1852, 14 D. 1065; sequel of preceding case.

[2] *Holmes and Campbell* v. *Cuninghame*, *supra*. And see *Norton* v. *Stirling*, 22 March 1855, 2 Macq. 205, as to a similar error of transcription in the record of the Register of Tailzies.

[3] *Stirling* v. *Moray*, 28 May 1845, 7 D. 640. It is not necessary to insert in the renewal of the investiture those branches of the succession which have already failed, and the entail is not challengeable by reason of their omission; *Lady Hawarden* v. *Dunlop*, 24 March 1865, 3 Macph. 748.

[4] *Borthwick* v. *Glassford*, 15 Nov. 1853, 16 D. 37. This case raised the interesting question whether an error in the investiture, upon which no attachment for debt has followed, is cured by the subsequent titles being correct? The error in question being found to be immaterial, it was not necessary to consider what effect was due to it after the estate had passed into the possession of an heir whose investiture was correct.

[5] 11 and 12 Vict., cap. 36, § 43.

[6] At an early period in the history of entails, it was settled that the Statute required the registration of settlements executed prior to its date, in order to their being effectual in questions with singular successors; *Philip* v. *Earl of Rothes*, 1758, M. 15,609, 16 Jan. 1761, 2 Pat. 52; *Lord Kinnaird* v. *Hunter*, 1761, M. 15,611, 18 Feb. 1765, 2 Pat. 97; *Earl of Rosebery* v. *Primrose*, 1765, M. 15,616, 3 April

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Court for authority to record the entail, which is produced with the petition. The application may be made by any of the heirs-substitute, and it is granted as of course. And where an application for authority to record an entail was opposed by the institute, who declined to take under the deed of entail, it was ruled that the validity of the entail was not in question in such an application, and that the warrant could not be refused when applied for by a party claiming under the deed.[1] A warrant for registration can only be obtained when the Court is actually sitting. An estate may thus be unavoidably exposed to the diligence of the institute's creditors during a Court vacation; and in a competition between creditors and heirs claiming under the settlement, the entail dates from the period of actual registration, and not from that of its production in Court.[2]

Deed to be recorded is the deed constituting the settlement or tailzied destination.

952. The proper deed to be recorded is the actual settlement of the estate, whether the form of the deed is that of a regular disposition with feudal clauses, or a procuratory of resignation,[3] or merely a disposition of the personal fee.[4] It is not necessary that the deed of entail should form part of the feudal title, and where it is a personal deed, the charter or other instrument by which the estate is feudalised is not required to enter the register.[5] Nor will the registration of a charter with restraining clauses, as part of the entail, obviate the objection that in the actual settlement the fetters are only imposed by reference.[6] Deeds of nomination of heirs, and other alterations of the settlement executed under reserved powers, must be recorded in the Register of Tailzies, otherwise the lands are not effectually entailed in a question with purchasers.[7] An entail in the form of a general disposition cannot bind creditors; and therefore, where an entailer, besides the lands specially disponed, conveys all his other lands and heritages subject to the fetters of the entail, and titles are made up under the

1767, 3 Pat. 651, overruling the cases of *Willison*, M. 15,371, and *Borthwick*, M. 15,554.

[1] *Gilmour* v. *Gilmour*, 6 Dec. 1858, 19 D. 134.

[2] *Williamson* v. *Sharp*, 3 Dec. 1851, 14 D. 127.

[3] *Irvine* v. *Earl of Aberdeen*, 1772, M. "Tailzie," App. No. 1; 16 April 1777, 2 Pat. 419; *Lord Forbes* v. *Gammell*, 14 May 1858, 20 D. 917.

[4] *Earl of Fife* v. *Duff*—opinion on remit, 20 March 1862, 24 D. 936; judgment 27 March 1862, 4 Macq. 469.

[5] *Earl of Fife* v. *Duff*, *supra*. In *Stirling* v. *Moray*, 28 May 1845, 7 D. 640, the objection that a Crown charter could not be recorded as an "original tailzie" by one of "His Majesty's subjects," was held to be obviated by a private Act of Parliament.

[6] *Forbes* v. *Gammell*, *supra*.

[7] *Earl of Mansfield* v. *Stewart* (Logiealmond), 23 May 1844, 6 D. 1073, 3 July 1846, 5 Bell, 139; *Montgomerie* v. *Earl of Eglinton* (Skelmorlie), 22 Jan. 1842, 4 D. 425; 18 Aug. 1843, 2 Bell, 149; *Inglis* v. *Inglis*, 18 Nov. 1851, 14 D. 54; 10 May 1853, 15 D. (App. Ca.) 44. And see *Broomfield* v. *Paterson* (Eccles), 1784, M. 15,618; 19 May 1786, 3 Pat. 50.

entail to the lands not specially dispened, upon which possession is had for the prescriptive period, these are nevertheless subject to the onerous deeds of the heir in possession, because they are not mentioned *by name* in the Register of Tailzies as the Act requires.[1] But an entail general is held to be binding *inter hæredes*, and it would seem that such a general disposition is equivalent to an obligation to execute an entail which the entailer's heir might be compelled to fulfil.[2]

Not necessary to record deed propelling succession, or repeating original destination.

953. It would appear that a deed in the form of a new entail, but being in substance a mere propelling of the succession,[3] or a renewal of the investiture, is not regarded as a deed of alteration, and need not be recorded. Of this nature was the settlement of the entailed estate in the case of *Gartmore*.[4] William Graham, the institute or first heir, inherited the estate of Gartmore and the lands of Culbowie from his father under distinct entails, the entail of Gartmore having been recorded by the father. In order to bring the lands of Culbowie within the investiture of the principal estate, William Graham expede an instrument of resignation of both estates for new infeftment under the conditions and restraining clauses of the grant. Upon the resignation thus made, a Crown charter was obtained, which set forth the fact that there were two entails, but did not repeat in duplicate the clauses that were identical in both. The subsequent titles were in terms of the charter. The entail of Culbowie was never recorded, and so far as regarded that estate the entail was not binding upon creditors. But as regards the estate of Gartmore, it was held that the instrument of resignation, and the charter consequent upon it, did not constitute a new settlement; that these instruments had no other operation than to bring the other lands within the investiture; and that the entail of Gartmore still rested upon the recorded disposition.

Unrecorded deed of alteration does not invalidate substitutions antecedent to those affected by the deed.

954. The case of *Norton* v. *Stirling*,[5] in its first branch, settled an interesting point in reference to the registration of instruments supplementary to deeds of entail. The maker of the entail, in the exercise of a reserved power, revoked the nomination of an heir,

[1] *King* v. *Earl of Stair*, 28 Feb. 1844, 6 D. 821; 30 April 1846, 5 Bell, 82.

[2] *Dalrymple* v. *Earl of Stair*, 10 March 1844, 3 D. 837, as explained by Lord Cottenham in *King's* case, 5 Bell, 104.

[3] *Turnbull* v. *Hay Newton*, 29 June 1836, 14 Sh. 1031; *Padwick* v. *Stewart*, 1874, 1 R. 697.

[4] *Graham* v. *Bontine*, 2 March 1837, 15 Sh. 711; 6 Aug. 1840, 1 Rob. 347. So also an unrecorded deed in the form of an entail, but the object and effect of which was simply to subject to the fetters of the original entail lands formerly held *pro indiviso*, but now divided, was held not to constitute a new settlement, and possession on it for forty years not to extinguish the original settlement; *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 73.

[5] *Norton* v. *Stirling*, 6 July 1852, 14 D. 944; 22 May 1855, 2 Macq. 205.

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Norton v. *Stirling.*

but the deed of revocation was never recorded. An action was, in consequence, brought by a creditor of an heir-substitute to have his debt constituted against the estate, on the ground that the whole settlement had not been recorded in the Register of Tailzies. It was held in the Court of Session that the objection did not affect the destinations antecedent to that in which the alteration was made, and that as the heir displaced by the deed of revocation was an heir who could not have come in until after the heir in possession, the latter was sufficiently restrained by the registration of the deed of entail. Lords Cranworth and St. Leonards, by whom the case was heard on appeal, having differed in opinion, the judgment of the Court of Session was affirmed. In the same case it was ruled that the registration of the entail was neither invalidated by reason of a mis-recital of the destination in the petition for authority to register the deed of entail; nor by an error in the transcription of the deed into the books of the record, which consisted in the substitution of the words "fail *to* neglect" for "fail or neglect" in the resolutive clause of the entail.[1] The settlement ought to be recorded entire, notwithstanding that a part of the estate has been previously sold.[2]

Effect of omission to record an entail.

955. The consequences of omission to record the entail differ according as the disponee in possession is infeft or uninfeft; and in the latter case there is a further distinction, depending on whether he possesses by the title of apparency, or upon the personal title of the entail. These consequences, in relation to the rights of creditors and singular successors, are explained in the next subdivision of the section.[3]

Prescriptive possession on unrecorded entail extinguishes rights of heirs-substitutes under prior recorded entail.

956. Where an entail is made in derogation of an existing entail, and is not recorded, and possession is had upon the new settlement for the prescriptive period, the original entail is extinguished by adverse possession, and the heir in possession at the end of the prescriptive period acquires an unchallengeable title under the unrecorded entail, which is equivalent to an estate in fee-simple.[4] Prior to the elapse of the prescriptive period, it is in the power of any of the heirs-substitute under the original settlement to bring the subsequent settlement under reduction, whether it be a real or a personal right, and thus to prevent prescription

[1] On this point in the case see the speech of Lord Chancellor Cranworth, 2 Macq. p. 211 *et seq.*

[2] *Moore* Petr., 28 Nov. 1821, 1 Sh. 173, N.E. 164.

[3] *Infra*, § 960 *et seq.*

[4] *Montgomerie* v. *Earl of Eglinton* (Skelmorlie), 18 Aug. 1843, 2 Bell, 149; *Stewart* v. *Stewart* (Logiealmond), 3 July 1846, 5 Bell, 139; *Inglis* v. *Inglis*, 10 May 1853, 15 D. (App. Ca.) 44. In the case of *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 72, the deed alleged to be the title of possession was held not to be a new settlement; consequently the rule stated in the text was not applicable.

running upon it.[1] And an heir-substitute can always prevent the acquisition of a fee-simple title by prescriptive possession on a valid but unrecorded entail, by having it recorded under the authority of the Court of Session.

Unrecorded entail is binding *inter hæredes;*

957. An unrecorded entail is binding *inter hæredes;* in other words, it is a bar to acts of gratuitous alienation.[2] This proposition is assumed in all the modern decisions; and, in the last century, it was even supposed that the next heir-substitute would have a claim of damages against the heir in possession for his breach of the prohibitions, or at least a right to require the re-investment of the consideration money.[3] This point underwent very deliberate consideration in the *Skelmorlie* case,[4] where it was held to be ruled by the judgment of Lord Eldon in the cases of *Ascog* and *Tillicoultry*, in reference to entails defective in the prohibitions. It would appear, therefore, that the disponee under an unrecorded deed of entail may sell the estate and appropriate the price to his own use, and that the heirs-substitute have no means of legal redress.[5]

and bars gratuitous provisions in excess of the powers which it confers.

958. Since the conditions of an unrecorded entail are obligatory upon the heirs, they will be effectual to bar provisions to younger children, unless where these are granted for onerous causes, as in the case of marriage-contracts;[6] and also to bar postnuptial provisions to wives, which, in so far as they exceed a rational and suitable provision, are deemed gratuitous.[7] Where the entail authorises the granting of provisions to a definite extent, provisions granted in excess will be restricted in terms of the power.[8]

Entail personal may be feudalised by adjudication or conveyance from the heir.

959. III. ENTAILS STANDING ON PERSONAL TITLES.—We have seen[9] that an entail may be made by a proprietor possessing on a personal title; that such a deed, although containing no feudal clauses, has, when recorded, the characteristics of a perfect entail, and that a title under it may be completed by conveyance from

[1] *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 72 (4th point).

[2] The law in relation to unrecorded entails is not altered by the Entail Amendment Act.

[3] *Douglas* v. *Strathnaver*, 25 Feb. 1730, 1 Pat. 32; and see *Willison* v. *Callender*, 1724, M. 15,369 and 15,371; *Hall* v. *Cassie*, 1726, M. 15,373.

[4] *Montgomerie* v. *Earl of Eglinton*, 18 Aug. 1843, 2 Bell, 149.

[5] But where a settlor conveys his estate to trustees upon trust to execute and record an entail, and they fail to record it, and wilfully allow the heir to contract debt on the security of the estate, the trustees may be responsible for a breach of trust. The case of *Brock* v. *Speirs*, 10 June 1845, 7 D. 858, was of this nature; but as the substitute at whose instance the security was sought to be reduced had incurred a general representation of the contravener, it was held that he had no title to sue.

[6] See Chapter XXXVI. (Marriage-Contract Provisions).

[7] *Noble* v. *Dewar*, 1758, M. 15,606.

[8] *Macgill* v. *Law*, 1798, M. 15,451. As to whether an unrecorded entail is effectual to exclude terce, see *Anderson* v. *Wishart*, 1715, M. 13,570.

[9] *Earl of Fife* v. *Duff*, 27 March 1863, 4 Macq. 469, commented on *supra* (Chapter XXVI., Section I.).

the heir-at-law, or by adjudication directed against him. A more usual case of an entail personal is where the entail contains within it the clauses necessary for the completion of a title by infeftment, but the disponee possesses on the unrecorded disposition. The law in relation to entails personal is embraced in the three following propositions :—

Estate taken under personal entail by heir of line held to be possessed on apparency.

960. (1.) Where the institute or heir of entail possessing on a personal title is also the apparent heir, or heir of line of the entailer, the estate is subject to adjudication for debts contracted by such heir or institute before the entail was recorded.[1] Apparency being a *quasi*-public title, creditors are entitled to ascribe the possession to that title rather than to an entail which has not been published in terms of the Statute, and of which they are not necessarily cognisant. If the person possessing on apparency is institute, his debts will transmit against the estate without service and without his having been for three years in possession.

What is requisite to exclude the creditors of an apparent heir.

961. (2.) To protect the estate from adjudication for the debts of a disponee who is apparent heir of the entailer, it is not enough that the entail is recorded in the Register of Tailzies. Infeftment must be taken upon the entail prior to the institution of an action of adjudication. The Statute requires publication of the conditions and restraining clauses of the deed both in the Register of Tailzies and the Sasine Register; and the entail is not binding on creditors until both these requisites have been fulfilled. Where the registration in the Register of Tailzies precedes the registration for infeftment, the latter has a retrospective operation, and secures the estate against all debts, *whensoever contracted*, on which real diligence has not been used.[2] Where, on the contrary, the infeftment precedes the registration in the Register of Tailzies, the latter has a retrospective effect only upon debts anterior to the date of the infeftment, and which are not the subject of real diligence; but it has no such effect in relation to purchasers[3] or creditors[4] con-

[1] *Douglas* v. *Stewart*, 1765, M. 15,616; *Russell* v. *Ross' Crs.*, 1792, M. 10,300. In the same circumstances, the apparent heir may also bring the estate to a judicial sale for the entailer's debts, under the Statute; *Mitchell* v. *Tarbutt*, 4 Feb. 1809, F.C.

[2] This proposition was established by the opinions of the Judges in the case last cited, as reported (under the name of *Pierse* v. *Russell*) in Bell's Oct. Ca. p. 166. By an extension of the principle, the infeftment of an heir-substitute (the entail being also recorded) secures the estate against the debts of the institute and heir-apparent of the entailer; *Dickson* v. *Syme*, 24 Feb. 1801, M. "Tailzie," App. No. 7. In such cases there is no passive representation in respect of the debts of the apparent heir; because the Statute postpones his creditors to those of the person last infeft, and also to those of the person who enters (Stat. 1695, cap. 24). Now, the conditions of the entail, when perfected by registration and infeftment, are obligations binding on the heir who enters, and therefore entitled to precedence under the Statute.

[3] *Grahame* v. *Grahame*, 10 Dec. 1813, 8 Sh. 231; 6 Oct. 1831, 5 W. & S. 759.

[4] *Grahame* v. *Grahame's Crs.*, 1795, M. 15,440; *Smollet's Crs.* v. *Smollet*, 14 May

tracting after infeftment and before registration. The last-mentioned debts, contracted in the interval between infeftment and registration, although wholly unsecured, are in the same position as entailer's debts, and may be made the ground of adjudication at any time.

Distinction between apparent heirs infeft and uninfeft.

962. It is not very easy to give an explanation of the distinction that will stand the test of strict criticism; but it may be said to depend on this principle, that an heir infeft on an unrecorded entail is in law regarded as a fee-simple proprietor, and that creditors are entitled to rely on the title shown by the records; while an apparent heir, having no vested interest in the estate, if he contracts debt, does so on his personal credit only. The distinction was at one time doubted, but it was finally settled by the case of *Munro* v. *Drummond*, here cited.[1] The position of a creditor or singular successor is apparently not affected by his knowledge of the entail.[2]

Heir of entail not *alioqui successurus* bound by personal entail.

963. (3.) Where the heir or institute in the entail is not the heir of line, and has no other title of possession than a personal entail, the restraining clauses are effectual to protect the estate against his acts and deeds, and are binding upon creditors,[3] singular successors,[4] and tenants.[5] In a question with the disponee in possession on a personal title, the prohibitions are binding as conditions of the grant; in questions with singular successors they are binding, on the general principle that the creditor or assignee can only take the personal right *tantum et tale*, or as it exists in the person of the cedent.

SECTION IV.

Consequences of Incurring an Irritancy.

Irritancy must be established by decree in the lifetime of the contravener.

964. By the Statute 1685 "the next heir of tailzie may, immediately on contravention, pursue declarators thereof, and serve

1807, M. "Tailzie," App. No. 12; *Munro* v. *Drummond*, 30 Aug. 1831, 5 W. & S. 359. Where the liability consists of a fluctuating balance due on a bank account, the account is to be regarded as closed on the day that the entail is recorded. If at that date there is a balance on the whole transactions in favour of the heir of entail, the estate will not be liable for subsequent advances; *Ross* v. *Drummond*, 3 March 1841, 3 D. 698. And see *Ferrier* v. *Duke of Roxburghe*, 10 Dec. 1813, F.C.

[1] See Bell's Illustr. vol. 2, p. 376.

[2] See *Williamson* v. *Sharp*, 3 Dec. 1851, 14 D. 127.

[3] *Denham* v. *Baillie* (Westshield case), 5 June 1733, 1 Cr. St. & Pat. 113; *Carleton's Crs.* v. *Gordon*, 1753, M. 10,258; *Syme* v. *Dewar*, 1803, M. 15,619. In the last of these cases the principle was applied, although the institute had been infeft upon a prior settlement declared revocable, and actually revoked by the personal entail.

[4] *Crs. of Carleton* v. *Gordon*, *supra*.

[5] *Chisholm* v. *M'Donald*, 27 Feb. 1800, M. "Tailzie," App. No. 6.

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heir to him who died last infeft in the fee and did not contravene, without necessity anyway to represent the contravener." It is therefore necessary that the contravention should be established by decree before the succession can open to the next substitute. It is settled law that a declarator of irritancy cannot be brought after the death of the contravener, even where the deed declares that he shall forfeit for himself and his descendants;[1] though, if the action were instituted in his lifetime, it might be transferred against his representatives, and prosecuted to a conclusion after his death.[2] This rule applies to all acts done or suffered by the heir of entail, in contravention of the statutory prohibitions of the entail, or of any other conditions or prohibitions to which the irritant and resolutive clauses are applicable. A clause of devolution, applicable to the event of the heir succeeding to an estate or title, takes effect *ipso facto* on the occurrence of the event in question. Such clauses are effectual as conditions of the destination; and as the devolution does not take place in consequence of any act of the heir, it is not necessary that a declarator should be brought either for the purpose of establishing the right of the next substitute or for divesting the heir in possession.[3]

Irritancy does not affect rights previously acquired under the powers of the entail.

965. Until the passing of the Entail Amendment Act, it was an unsettled question whether the decree declaring the irritancy operated retrospectively, so as to invalidate acts done after the contravention, but before decree, which are competent to an heir of entail in possession, *e.g.*, the granting of provisions under reserved powers,[4] or the creation of securities restricted to his life interest.[5] By this Act[6] it is enacted, "That no irritancy committed or that may be committed by any heir of entail in possession of an entailed estate in Scotland shall operate to set aside, impair, or in any way affect, directly or indirectly, in the person of any purchasers or *bona fide* onerous creditors, any conveyances, deeds, or securities granted in reference to such estate, or the rents thereof, prior to the execution of the summons of declarator on which decree in

[1] *Maxwell* v. *Maxwell*, 15 Dec. 1843, 6 D. 255; affirmed 13 July 1846, 5 Bell, 165; *Gordon* v. *King's Advocate*, 1750, M. 4728, 5 Br. Sup. 782; *Fullerton* v. *Dalrymple* (second Bargany case), 20 June 1825, 1 W. & S. 410, and 1 Sh. (App. Ca.) 265, and 1 W. & S. Appx. No. 2; *Gordon* v. *Gordon*, 1749, M. 15,384.

[2] *Stewart* v. *Denholm* (Westshiells), 1726, M. 7275.

[3] *Viscountess Hawarden* v. *Elphinstone's Tr.*, 2 Feb. 1866, 4 Macph. 353, not affected by the judgment on appeal.

[4] See *Lothian* v. *Willison*, 1725, M. 15,554.

[5] *Bontine* v. *Graham*, 2 March 1837, 15 Sh. 711. In a subsequent branch of the case it was held that the heir obtaining declarator of irritancy had a good action for the rents accruing in the interval between the incurring of the irritancy and the decree,—20 Dec. 1838, 1 D. 286.

[6] 11 and 12 Vict., cap. 36, § 40.

respect of such irritancy shall proceed, and not invalid as being inconsistent with the provisions of the entail under which such estate is held."

Purgation of irritancies.

966. The defender may purge the irritancy by performing acts omitted, and revoking deeds granted in contravention of the entail, and that at any time before decree is pronounced. In the case of a contravention by way of alienation or contraction of debt, the concurrence of the purchaser or creditor is obviously necessary to enable the heir to make restitution.[1] It was long doubted whether a contravention of an entail, by making up titles in fee-simple, was an irritancy which the heir was entitled to purge, but the point was at length settled in favour of the contravener.[2]

Effects of reductive and declaratory decrees distinguished.

967. It is necessary to distinguish between the remedies of reduction and declarator of irritancy. The former is competent at any time, even after the death of the heir whose deed or contract is sought to be reduced; and the action cannot be stayed by a judical offer of restitution.[3]

Title to pursue declarators of contravention.

968. Any heir-substitute, however remote, is entitled to pursue a declarator of contravention.[4] As already mentioned, the action must be directed against the heir by whom the contravention was committed. Action may accordingly be maintained against an heir possessing on the title of apparency.[5] If the deed declares that the contravener shall forfeit for himself and his descendants, it is generally understood that the condition is effectual to the full extent unless an offer of purgation is made;[6] but where descendants are not mentioned, the effect of forfeiture is merely to propel the succession to the next heir under the destination.

[1] See *Hamilton Gordon* v. *Gordon*, 1748, M. 7281; *Ross* v. *Munro*, 1766, M. 7289.

[2] *Abernethie* v. *Forbes* (Balbithan), 17 Jan. 1835, 13 Sh. 263; *Abernethie* v. *Gordon*, 20 June 1837, 15 Sh. 1167.

[3] *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 73; and see *Duke of Queensberry's Exrs.* v. *Duke of Buccleuch*, 6 July 1820, F.C.; *dicta* in *Maxwell* v. *Maxwell*, 5 Bell, 165.

[4] *Dundas* v. *Murray*, 1774, M. 15,430; *Simson* v. *Lord Home*, 1697, M. 15,353.

[5] *Stewart* v. *Denholm*, 1726, M. 7275.

[6] See on this point *Mackay* v. *Dalrymple*, 1798, M. 11,171, and Mr. Sandford's observations, Treatise on Entails, pp. 445-6.

CHAPTER XXVIII.

ESTATE OF AN HEIR OF ENTAIL IN POSSESSION.

1. Restraints on the Power of the Heir as Proprietor.
2. How an Entail may be made effective in the Entailer's Lifetime.
3. Liability of the Estate for Entailer's Debts and Real Burdens.
4. Payment of Debts, whether operating as Extinction or as Assignation.

SECTION I.

Restraints on the Power of the Heir as Proprietor.

Heir of entail a limited fiar subject only to the restrictions specified in the entail.

969. An heir or institute of entail is held to be a fiar, and he takes an estate in fee under the tailzied destination, being subject to no other restrictions in the exercise of his proprietary rights than such as are expressed in the prohibitions of the deed of entail. The restrictions prescribed by the Statute of 1685 are of a general character, and apply to all deeds falling within the three categories, —alienation, contraction of debt, and alteration of the succession. But the principle of interpretation applied to the Statute enabled entailers (without exposing the entail to objections affecting its validity) to constitute exceptions to the prohibitions; and, to the extent to which the estate was excepted from their operation, it was held to be unentailed, and subject to the debts and deeds of the heir in possession. The Entail Amendment Act makes no change in this respect. An entailer may affect, and indeed is authorised by the Statute to affect, the estate with other prohibitions and conditions than those which are specified in the Statute; and such conditions and prohibitions, if fenced with irritant and resolutive clauses, are effectual according to their tenor.

Restraints on power of alienation: 1. Waste; 2. Granting leases; 3. Feuing and Granting securities.

970. An heir of entail is accordingly entitled to do every act competent to an unlimited fiar which is not prohibited by the entail. The questions which have arisen with respect to the validity of the acts and deeds of proprietors of entailed estates have relation chiefly to the interpretation to be given to the statutory prohibition against alienation.[1] These may be divided into three classes:

[1] A conveyance to the heir-presumptive, so as to propel the succession, is held not to be struck at by any of the statutory prohibitions; *Gordon's Crs.* v. *Gordon*,

(1) questions relating to "waste," such as cutting timber, working minerals, and the like; (2) questions relating to alienation by granting long leases, and (3) questions relating to alienation by dispositive acts, as the granting of feus or conveyances in security.

Powers of heir of entail in relation to cutting timber.

971. (1.) An heir of entail is not, like a liferenter, obliged to a use of the estate *salva rei substantia*. He may cut down timber for sale, or sell the growing timber on the estate to be cut down.[1] It has been attempted in various circumstances to restrain the exercise of this right, as the cutting of unripe wood, of ornamental timber, or wood which it is proper in a due administration of the estate to preserve;[2] "but," says Professor Bell,[3] "in all these cases the restraint is so discretionary, and so little grounded on any settled judicial principle, as to raise great doubts whether it can be enforced." The cases, however, may be held to establish the rule, that wood necessary for the shelter and ornament of the mansion-house is protected against waste, and that the heirs-substitute may interfere by interdict to prevent injury to the mansion-house or its accessories.[4] And where the cutting of timber is expressly restrained by the prohibitions of the entail, effect will be given to the will of the entailer.[5] The right of cutting wood passes with the estate; and therefore, if an heir of entail should die pending the execution of a contract for cutting timber, his executors are only entitled to the value of the trees actually cut down before his death.[6]

Powers of heir of entail in relation to the working of minerals.

972. An heir of entail is also entitled to work minerals; and it is not a relevant objection to the use of the right that they are being wrought to exhaustion. Indeed, it is clear that this is merely a question of degree, as to which there are no *termini habiles* for assigning a limit to the powers of the proprietor. The leading authority is the *Bredisholme* case,[7] where an heir of entail having let the whole minerals of the estate at a fixed rent of £700 per annum, without the alternative of a royalty, which minerals were again sublet to different tenants at rents amounting in the aggre-

1749, M. 15,384, Elch. "Tailzie," 37; *Halket Craigie* v. *Craigie*, 4 Dec. 1817, F.C.

[1] *Hamilton* v. *Viscountess Oxenford*, 1757, M. 15,408. See observations on this case, 8 M. 643.

[2] *Mackenzie* v. *Mackenzie*, 1 March 1824, 2 Sh. 775, N.E. 643; *Bontine* v. *Carrick*, 16 June 1827, 5 Sh. 811; 17 Nov. 1827, 6 Sh. 74; *Lord Cathcart* v. *Shaw*, 1755, M. 15,399, 5 Br. Sup. 816; 19 March 1756, 1 Cr. St. & Pat. 618; *Gordon* v. *Gordon*, 24 Jan. 1811, F.C.; *Boyd* v. *Boyd*, 1870, 8 Macph. 637.

[3] Bell's Pr. § 1754.

[4] *Bontine* v. *Graham's Trs.*, 17 Nov. 1827, 6 Sh. 74, and other cases in note 2.

[5] *Moir* v. *Graham*, 20 June 1826, 4 Sh. 730, N.E. 737.

[6] *Cathcart* v. *Shaw*, 1755, M. 15,399; 19 March 1756, 1 Cr. St. & Pat. 618; *Stewart* v. *Stewart's Exrs.*, 1761, M. 5436; *Lord Elibank* v. *Renton*, 15 Jan. 1833, 11 Sh. 238.

[7] *Muirhead* v. *Young*, 13 June 1855, 17 D. 875; 13 Feb. 1858, 20 D. 592.

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gate to £3000, an action was brought by the next heir to have the lease set aside as a constructive alienation of the estate, or undue exercise of the power of granting leases. The Court allowed the pursuer a proof of his averments, but ultimately repelled the reasons of reduction, on grounds which implied that the pursuer could only succeed by showing unfairness in the contract.[1] A subsequent action of declarator and damages against the tenants, on the ground that they were rapidly working the minerals to exhaustion, was dismissed as irrelevant.[2] An heir in possession was held entitled to communicate the coal levels to an adjoining colliery under certain restrictions, notwithstanding a prohibition in the deed of entail, because this was a measure proved to be beneficial to the estate, and the prohibition, being in no way auxiliary to any of the cardinal prohibitions of the entail, could not be enforced as a right by a substitute heir.[3]

Heir bound to preserve the mansion-house and ornamental timber.

973. On considerations of equity and of convenience, the mansion-house of an entailed estate and its pertinents constitute an exception to the rule that the heir in possession has the full powers of a proprietor in fee in relation to the administration of the estate. Therefore, first, the heir in possession is not entitled to let the mansion-house, garden, or pleasure-grounds on lease, except for a term limited to the duration of his own life;[4] secondly, he cannot cut down timber adjoining the mansion-house, and necessary for its shelter or ornament; and thirdly, he cannot pull down the mansion-house and sell the materials.[5] But it would seem that he may allow the mansion-house to go to ruin for want of repair;[6] and that he is even entitled to pull it down, "provided he *bona fide* immediately builds a new house and offices equally as good, and that either on the same site, or on any other equally suitable on the estate."[7] In England, it is held that if a proprietor of a settled estate wrongously cuts ornamental timber, he may be compelled to invest the money for the succeeding heirs, and he is not

[1] The Court were of opinion that the law was fixed by Lord Eldon's *dictum* in the *Tinwald* case, that "there must be some unfairness, some fraud, or some gross culpable negligence, operating as mischievously as fraud would operate," to justify the interference of the Court; *Marquis of Queensberry* v. *Montgomery*, 26 May 1820, 6 Pat. 551, see p. 581; see also Lord Eldon's speeches in the other actions arising out of the Queensberry leases, and particularly *Duke of Buccleuch* v. *Montgomery*, 12 July 1819, 6 Pat. 520.

[2] 20 D. 592.

[3] *Clerk* v. *Clerk*, 1872, 10 M. 647, 654.

[4] *Lord Cathcart* v. *Shaw*, 1775, M. 15,399, 15,403; 19 March 1756, 1 Cr. St. & Pat. 618; *Leslie* v. *Orme*, 1799, M. 15,530, Hailes, 832; 25 Feb. 1780, 2 Pat. 533; see also *Turner* v. *Turner*, 6 Dec. 1811, F.C.

[5] *Gordon* v. *Gordon*, 24 Jan. 1811, F.C.

[6] Sandford on Entails, p. 281.

[7] *Moir* v. *Graham*, 20 June 1826, 4 Sh. 730, N.E. 737.

entitled to the interest of it during his life.[1] But if a proprietor of a settled estate insure the manor-place, and it is accidentally destroyed or injured by fire, he is not bound to expend the insurance money in erecting a new mansion, for he was not under any obligation to insure the subject against accidental destruction for the benefit of his heirs.[2]

General prohibition against alienation applies to long leases.

974. (2.) The statutory prohibition against alienation is sufficient to protect the interests of the heirs of entail against the virtual alienation of the estate, or fraudulent diminution of its value, by the granting of long leases. The word "alienate" is a comprehensive legal expression for every description of grants of heritable estate, and is properly applicable to leasehold grants in excess of the powers of administration competent to an heir in possession;[3] and it is settled by a series of decisions that a prohibition to "dispone" is also applicable to the constitution of long leases.[4] This branch of the law of entail was the subject of very elaborate discussion in the *Queensberry* lease cases, celebrated both for the magnitude of the interests involved and for the ingenuity displayed in the various devices which were resorted to for evading the obligations to lease at a fair rental and for a limited term of endurance. Respecting these and other decisions, which bulk largely in the reports of the early part of the present century, it may be affirmed generally that they constitute an effectual barrier against any attempt on the part of an heir of entail to diminish the interest of his successors by unfair administration of the estate. Their authority is universally accepted; no questions of a similar nature are likely to arise in practice, and it is therefore unnecessary to review the history of this doctrine of the law of entail, or to state the circumstances of the cases in which it was established.[5]

Queensberry lease cases.

Summary of points decided as to leases granted in contravention of entail.

975. The results are stated by Professor Bell nearly as in the following propositions, which embrace all the material points:[6]— 1. Long leases are forbidden by the clauses prohibiting dispositions and alienations; under which description (after many doubts and conflicting decisions) all leases seem to be included which exceed the ordinary term of a fair agricultural lease; or which are not

[1] *Lushington* v. *Boldero*, 21 L.J. Ch. 49.

[2] *Seymour* v. *Vernon*, 21 L.J. Ch. 433.

[3] The *Queensberry* lease cases, reported in F.C. under dates 25 May 1813, 15 and 17 Nov. 1815, 7 March 1816, 5 Feb. 1818, 2 Feb. 1821, 11 Dec. 1821, and 12 June 1822; on appeal in 6 Pat. 465-548, and 6 Pat. 551.

[4] *Hamilton* v. *Macdowall*, 3 March 1815, F.C.; *Eliott* v. *Pott*, 14 March 1821, 1 Sh. (App. Ca.), 16; *Stirling* v. *Dunn*, 22 June 1829, 3 W. & S. 462.

[5] For a more detailed exposition of the subject, see Sandford on Entails, chapter 6, sections 3 and 4.

[6] Bell's Pr. § 1752.

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leases for the purpose of improvements.[1] 2. Leases granted in contravention of a prohibition against alienation are not good to any extent, nor will they be sustained even when, at the time of the challenge, the unexpired period does not exceed the term permitted by the entail.[2] 3. Leases, whether of long or of short duration, are held to fall under the prohibition against alienation if granted in consideration of a grassum, or if a sum is taken by the lessor in addition to the stipulated yearly rent.[3] 4. A collusive or fraudulent lease, at a low rent, granted in circumstances to gain an advantage over the next heir, is reducible.[4] 5. An heir of entail may take a renunciation from a tenant and grant a new lease;[5] but a new lease while the old is current will not be effectual to bind the succeeding heir of entail.[6]

Regulation of powers of leasing by the Acts of Will. IV. and of the Queen.

976. It may be added that the duration of leases of entailed lands is now virtually regulated by the Act 6 and 7 Gul. IV., and the subsequent Entail Amendment Acts.[7] By the first-mentioned Act, the heir of entail in possession is empowered to grant leases, not exceeding twenty-one years' duration, without grassum or any valuable consideration except the rent; but not to include the home farm or mansion-house in any lease beyond the granter's life.[8] By 16 and 17 Vict., cap. 94,[9] heirs are authorised, subject to the approval of the Court of Session, to grant feus and long leases to an extent not exceeding in all one-eighth part in value for the time of the entailed estate, at a minimum feu-duty or tack-duty to be fixed by the Court, and on condition that no grassum or other valuable consideration shall be taken.

Term of endurance of leases under those Statutes.

977. The provisions of the Act 6 and 7 Gul. IV. have been held to authorise the granting of mineral leases for the period of twenty-one years;[10] but it has been doubted whether a lease

[1] *Leslie* v. *Orme*, 1779, M. 15,530, Hailes, 832; affirmed 25 Feb. 1780, 2 Pat. 533; *Malcolm* v. *Brown*, 1807, M. "Tailzie," App. No. 17; affirmed 2 Dow, 285; *Turner* v. *Turner*, 1807, M. "Tailzie," App. No. 16; affirmed 1 Dow, 423; *Queensberry* lease cases, *supra*; *Mordaunt* v. *Innes*, 9 March 1819, F.C.; affirmed 5 July 1822, 1 Sh. (App. Ca.) 169.

[2] *Innes* v. *Mordaunt*, 5 July 1822, 1 Sh. (App. Ca.) 169; *Malcolm* v. *Bardner*, 19 June 1823, 2 Sh. 410, N.E. 366.

[3] *Queensberry* lease cases, *supra*, and *Earl of Wemyss* v. *Duke of Queensberry's Exrs.* (on remit from H.L.), 11 Dec. 1821, 1 Sh. 202, N.E. 190, overruling *Elliot* v. *Currie*, 1798, M. 15,450.

[4] *Lord Elibank* v. *Hamilton*, 16 Nov. 1827, 6 Sh. 69; *Justice* v. *Ross*, 21 Nov. 1829, 8 Sh. 108.

[5] *Marquis of Queensberry* v. *Duke of Queensberry's Exrs.*, 15 Nov. 1815, F.C., 26 May 1820, 6 Pat. 551.

[6] *Leslie* v. *Orme*, 1779, M. 15,530; 25 Feb. 1780, 2 Pat. 533; *Kerr* v. *Redhead*, 5 Feb. 1794, 3 Pat. 309, reversing Bell, 202.

[7] 11 and 12 Vict., cap. 36, § 4; and 16 and 17 Vict., cap. 94, § 6.

[8] 6 and 7 Gul. IV., cap. 42, § 1; extended by 1 and 2 Vict., cap. 70, to unrecorded entails. See also 10 Geo. III., cap. 51, §§ 1-7, as restricted by 11 and 12 Vict., cap. 36, § 12.

[9] § 6.

[10] *Muirhead* v. *Young*, 13 June 1855, 17 D. 875.

of shootings for that time would not be bad, in respect of the term being in excess of the customary duration of such leases.[1] With regard to the question of the sufficiency of the consideration, it is held that the heir is entitled to fix the rent according to the value of the lands at the time of granting the lease; and so, if the rent is proved to be inadequate with reference to the period of the inception of the lease, the transaction is not binding on succeeding heirs.[2]

Prohibition against alienation applies to feu-dispositions. Equitable construction of powers of feuing.

978. (3.) The granting of feu-rights is evidently an act in breach of a prohibition against alienation, even where the subjects are given off at a fair feu-duty, and where such a mode of administration is proved to be beneficial to the estate. A general power of granting feus, when granted to heirs of entail by the entailer, is confined in construction to feus which may be granted in the fair administration of an estate, for the purpose of increasing its revenues, and consistently with the retention of the substantial rights of a proprietor of a landed estate. A power of feuing cannot be used to such an extent as to reduce the estate to a right of superiority. This is the point which was decided in the case of the *Roxburghe* feus. The entail of the Roxburghe estates contained a prohibition against alienation, disposition, contracting debt, or doing anything in hurt of the tailzie and succession, in whole or in part; but a power was given to the heirs of entail "to grant feus, tacks, and rentals of such parts and portions of the said estates as they should think fitting, provided the same were made without hurt and diminution of the lands and others, as the same should happen to pay at the time the heir-granter should succeed thereto." In the assumed exercise of this power, the heir of entail in possession granted to the same individual sixteen feus of parts and portions of the estate, embracing in the aggregate the entire entailed estate. At the same time the grantee entered into a contract that the estates granted to him in feu-farm should be entailed in favour of a new series of heirs designated by the granter, and that the granter should retain the liferent use of the estates. The grantee having executed an entail in terms of his obligation, a reduction of the transaction was instituted by the next heir-substitute under the subsisting entail. The Court reduced the deeds, stating as their reasons for the judgment, in answer to a remit from the House of Lords on appeal, that the grants in question could not be held to be real feus or dispositions *inter vivos*, but were settlements of succession, made in order to accomplish an alteration of the order of succession prescribed by

Roxburghe feus.

[1] *Earl of Fife's Trs.* v. *Wilson*, 14 Dec. 1859, 22 D. 191.

[2] *Gray* v. *Skinner*, 10 June 1854, 16 D. 923.

the entail, contrary to the prohibitions contained therein. This judgment was affirmed by the House of Lords for the same reasons.[1]

Prohibition against alienation applies to alienation in form of adjudication for fictitious debt.

979. This principle of construction is also illustrated by the decision in the *Carleton* case, where, the entail being defective in the clauses applicable to the contraction of debt, an attempt was made to alter the order of succession by the device of granting a bill for the value of the estate (£150,000) to a confident person, who adjudged the estate, and reconveyed it to the heir on a fee-simple title. In a reduction of a new entail executed by this heir, the deed was set aside, on the ground that the proceedings for the attachment of the estate were fictitious and illusory; that in order that advantage might be taken of a defect in the prohibitory clause of an entail, the act prohibited must be truly and actually done; and that a breach of a valid prohibition could not be committed under colour of doing something that was not effectually prohibited.[2]

General power of alienation on condition of reinvestment: held not repugnant to the entail.

980. A general power, embracing *all acts* falling within one of the three statutory prohibitions, would obviously nullify the entail, for such a power is equivalent to a revocation of the prohibitions. But a general power of sale qualified by the condition of reinvestment of the price in the purchase of other lands in Scotland of equal value has been held good; and such a power may, it seems, be exercised on complying with the condition on which it is given, though that condition is not specially fenced with irritant and resolutive clauses.[3] A general power to exchange the entailed lands for lands in Scotland of equal value is, on the same authority, not inconsistent with the subsistence of an entail.

Consolidation of property with entailed superiority has not the effect of entailing the property.

981. Where an heir of entail acquires by singular title the right of property or *dominium utile* of lands, the superiority of which is comprised in the entail, and afterwards consolidates the right of property with the superiority, he does not thereby entail the property. He is entitled to reconstitute the feu-right, and may be compelled to do so by an action at the instance of a purchaser to whom he has sold it.[4] And the estates may, in the same way, be separated by any of the succeeding heirs of entail to whom they may descend under the destination in the superiority titles.[5]

[1] *Ker* v. *Innes Ker*, 12 Jan. 1808, M. "Tailzie," App. No. 18; remitted 6 July 1812, 5 Pat. 609; judgment affirmed 18 Dec. 1813, 5 Pat. 768.

[2] *Cathcart* v. *Cathcart*, 10 July 1831, 5 W. & S. 315. See also *M'Kenzie* v. *Stewart*, 1751, M. 7443.

[3] *Baird* v. *Baird* (Newbyth), 10 Feb. 1844, 6 D. 613, decided in conformity with the unanimous opinion of the whole Court. It was observed that under such powers the estate could not be sold or excambed *per aversionem*.

[4] *Heron* v. *Duke of Queensberry*, 27 April 1733, 1 Pat. 98.

[5] *Galbraith* v. *Graham*, 14 Jan. 1814, F.C. And see *Duke of Roxburghe* v. *Wauchope*, 9 March 1825, 1 W. & S. 41.

SECTION II.

Conditions necessary that an Entail may be effective in the Entailer's Lifetime.

Gratuitous alienations and alterations barred by infeftment and registration of the entail.

982. To the constitution of an entail which shall be effectual to bar gratuitous alienations or alterations of the succession by the entailer, nothing more is requisite than that the disposition should be conceived in favour of the entailer as institute; that the fetters should be applied to the grant in his favour, and that the entail should be completed by infeftment and registration in the Register of Tailzies.[1] The *dictum* of Erskine in the following passage (if understood to refer to gratuitous acts of contravention) is a correct statement of the doctrine, and the reason on which it depends: "Though an entail, executed by one who had laid himself under no previous obligation, may be altered at the pleasure of the maker, even where it contains prohibitory clauses restraining the heirs of entail from altering the succession, yet, if he has directed the prohibitions not only against the subsequent heirs but himself, he is as effectually restrained as they, even though he should have got no valuable consideration for fettering himself, because it is implied in the nature of property that the proprietor can dispose of it at pleasure; and if he can gift it absolutely to another, he may, *a fortiori*, restrict himself in the manner of using it. It is upon this principle that all donations by a proprietor are effectual, which, though they be at first voluntary, may be so constituted by the donor as not to be subject to revocation."[2]

Gratuitous alienation barred by onerous obligation to execute an entail.

983. Further, as explained in the sequel of the passage quoted from Erskine, a mere obligation to execute an entail, where it is granted for an adequate valuable consideration, imports, in a question with the grantee, a restraint upon the maker in relation to the right of selling or disposing of the estate, although such restriction should not be expressed, for the same reason for which one who sells an estate for a fair price is bound in warrandice that the right shall be effectual to the grantee. "Hence," he continues, "if two persons should enter into mutual obligations to execute entails in favour of each other, neither of them is revocable without the consent of both parties; and if either party should sell his entailed lands, in consequence of the right of fee which he still retained in them, with a fraudulent view to disappoint the succession, an action lies against him for damages."[3] In relation to the

[1] *Douglas* v. *Duke of Hamilton*, 1762, M. 4358, 4375; *Binny* v. *Binny*, 1688, M. 4305.

[2] Ersk. 3, 8, 24.

[3] Ersk. 3, 8, 24, and cases there cited.

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question of obligation, it is obviously of no consequence whether infeftment has or has not been taken upon the conveyance in the contract;[1] and it was so held in an early decision.[2] And even where a settlement is not founded on any expressed or antecedent obligation, yet if the entailer has only a liferent, and if possession be ceded, as by allowing the disponee to take infeftment, or by recording the entail in the Register of Tailzies (which is equivalent to delivery), the deed is past recall as far as the entailer is concerned. But the mere infeftment of the entailer himself as institute under the disposition does not exclude his right to revoke by deed in *liege poustie*,[3] and still less can the mere execution of a personal entail have this result.[4]

Estate secured against future debts (1) where entailer has only a liferent; (2) where entail is onerous.

984. Two cases have been distinguished in which an entailer, while retaining the substantial right to his estate, may so settle it as to protect it from liability to attachment for debts which he may subsequently contract. *First*, where the entailer is divested of the fee-simple in his lifetime, as he may be by infeftment upon a conveyance to himself in liferent and to an institute and heirs of entail in fee: *Secondly*, where the entailer, though not divested of the fee, is infeft as institute under a recorded deed of entail which he is barred by onerous obligation from revoking. The reason of the first case is too obvious to require explanation;[5] and it is only necessary on this point to notice the distinction taken in the *Barholm* case between personal entails and entails completed by registration and infeftment. The former are revocable by the joint act *inter vivos* of the liferenter and the institute,[6] and are therefore liable to be defeated by voluntary alienation; the latter are in all respects protected by the Statute.

Liferent.

Doctrine of onerous entails.

985. The second of the two points referred to in the preceding paragraph is the one decided in the *Sheuchan* case, the leading authority in reference to the effect of onerosity in deeds of entail. It must be premised that the Statute of 1685 does not confer upon proprietors the power of entailing their estates to the prejudice of their own creditors, either in relation to past or future obligations. Accordingly, in the case of *Dickson* v. *Cunninghame*, an entailer infeft upon a settlement in favour of himself and certain heirs-substitute, and protected by prohibitions, irritant and resolutive clauses, in terms of the Statute, was found to have the power of disposing of the lands to a purchaser. The report bears: "The Lords con-

[1] *Schaw* v. *Houston*, 1715, M. 15,572, affirmed 10 March 1718, Roberts, 203.

[2] *Dickson* v. *Cunninghame*, *infra*.

[3] *Lord Lindores* v. *Stewart*, 1714, M. 7735.

[4] See on this point *M'Intosh* v. *M'Intosh*, 28 Jan. 1812, F.C.

[5] *Scott* v. *Scott*, 1713, M. 15,569.

[6] *Gordon* v. *Dewar* (*Barholm* case), 1771, M. 15,579; *Moray* v. *Ross*, cited in Sandford on Entails, p. 225.

sidered the entail to be altogether ineffectual in a question with the creditors of the entailer. The Statute 1685, authorising settlements of that sort, related, it was observed, to the case of heirs alone, whose interest might, according to the forms therein prescribed, be limited or modified by the deed of the ancestor from whose gift they derived the estate. But the case of the proprietor himself was left to the consideration of the common law."[1] In consequence of the ultimate decision in the *Sheuchan* case, an attempt was made many years afterwards to reduce the sales effected under the authority of the last-mentioned judgment; but it was held, on appeal, that the original action had been rightly decided.[2]

Entail executed in pursuance of marriage-contract obligation.

986. The case of *Sheuchan* is distinguished from the preceding case by the element of onerosity. This element, which in fact determined the case in favour of the heirs of entail, appears not to have been adverted to in the original decision of the Court of Session; and it was not finally established by the House of Lords until after the elapse of thirty years from the date of the original decree, and after the case had been remitted to the Court of Session for reconsideration. In this case the settlement was in the form of a mutual entail and postnuptial contract of marriage, whereby Mr. Agnew (whose only daughter was married to the other entailer, Mr. Vans) conveyed his estate of Sheuchan to Mr. and Mrs. Vans, and the survivor of them, and the heirs of their marriage, with certain other substitutions, for which causes Mr. Vans made a similar disposition of his estate of Barnbarroch. The entail was executed in 1757, and was immediately recorded, but infeftment was not taken upon it until the year 1775. Upon the death of Mr. Vans, the entailer, in 1781, an action was brought by his creditors, concluding for reduction of the entail, or at least that all the debts of the entailer were effectual against the estate of Barnbarroch. It was found in the Court of Session that the estate was "affectable" by the debts due by the entailer at the time of his death.[3] The judgment of the House of Lords (moved by Lord Eldon) was as follows:—"That so much of the interlocutor of the 3d March 1784, as found generally that the estate of Barnbarroch was affectable by the debts of John Vans at the time of his death, be and the same is hereby reversed; and the Lords find that such estate was affectable only by the debts of the said John Vans which were due at the time of the date of the deed of tailzie of the 29th of December 1757, and which remained due at the time of his death, and such

[1] *Dickson* v. *Cunninghame*, 1786, M. 15,534.

[2] *Dickson* v. *Cunninghame*, 1 Oct. 1831, 5 W. & S. 657.

[3] *Stewart* v. *Vans Agnew* (Sheuchan), 1784, M. 15,435.

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other debts of the said John Vans (if any) as had become real charges upon the said estate, before the infeftment of the 20th of May 1775; and refer the cause," &c.[1]

Principle of onerosity as applied to mutual settlements.

987. The grounds of the decision were substantially these: first, the entail was onerous—a price was virtually paid for the right conferred upon the heirs of entail in consequence of which they were creditors of the entailer; secondly, the infeftment of the entailer upon a deed which disclosed an onerous cause of granting, and set forth the destination in such a way as to make the right of the heirs-substitute a burden on the estate, was equivalent to the infeftment of the heirs-substitute themselves, and gave them precedence over other creditors whose debts were not made real before the date of the infeftment upon the deed of entail; and, thirdly, that the Statute of 1685 did not so limit the conditions on which an entail could be constituted, as to prevent an entailer from effectually directing the prohibitions against himself, such restriction being for an onerous cause, and being made public by entering the infeftment on the entail, and by the registration of the entail in the statutory record.

Result of the authorities as to making entails binding on the granter.

988. The results of the foregoing examination of the authorities may be stated in the following propositions:—1. Where the deed of entail divests the granter of the fee, and leaves him only a liferent of the estate, then, as long as the entail remains personal, it can only be binding *in obligatione*, and may be discharged with the consent of the institute; but after registration and infeftment[2] it is a complete entail, incapable of being defeated by the debts or deeds either of the granter or the institute. 2. Where the granter is not divested, but the entail is onerous, and the restraining clauses are directed against the entailer as institute, the entail, while it remains personal, is effectual to bar gratuitous alienation; after registration in the Register of Tailzies it is effectual in respect of its onerosity against the personal creditors of the institute, whose claims are subsequent in date to the registration of the deed; after registration and infeftment it is effectual against all creditors whatsoever, except those whose claims "had become real charges upon the estate before the infeftment."[3] 3. Where the granter is not divested and the entail is not onerous, the settlement may be made binding *inter hæredes* by compliance with the requisites of the Statute; but the estate continues to be liable for the debts and obligations of the entailer to the time of his death.[4]

[1] *Agnew* v. *Stewart*, 31 July 1822, 1 Sh. (App. Ca.) 320, 331. See also *Agnew* v. *Earl of Stair*, 1 Sh. (App. Ca.) 333.

[2] *Govdon* v. *Dewar* (Barholm), 1771, M. 15,579.

[3] Interlocutor in the *Sheuchan* case, cited *supra*, § 986.

[4] *Earl of Lauderdale* v. *His Heirs of Entail*, 1730, M. 15,556; *Dickson* v. *Cunninghame*, 1786, M. 15,534; 1 Oct. 1831, 5 W. & S. 657.

SECTION III.

Liability of the Estate for Entailer's Debts and Real Burdens.

Limits of the subject. Liability under powers.

989. The case has already been considered of the liability which attaches to a settled estate for debts, whether contracted by the entailer, the institute, or the heirs of entail, by reason of the entail being defective in the prohibitory or restraining clauses applicable to the contraction of debt.[1] Again, an entailer may reserve power to himself and the heirs of entail to alienate certain parts of the estate, to burden the estate with debt to a certain amount, or to alter the succession within certain limits. With reference to all such reservations the rule is clear, that to the extent to which the estate may be alienated or burdened it is unentailed, and may be attached by creditors. This principle does not apply to the reservation of a power of altering the succession by nominating additional heirs, for this is a power which cannot be exercised so as to give an interest to creditors.[2]

Liability under principle of representation, or under direction to charge.

990. An heir of entail, moreover, may be liable for the debts of the entailer, if he represents him as heir, under the passive titles; or he may be liable to make good the entailer's debts, either out of the entailed estate or otherwise, in virtue of an obligation to that effect introduced as a condition into the deed constituting the entail.[3] In the case of the entailer's debts being charged upon the estate by the deed of entail, or by a relative settlement, the chief difficulty consists in determining whether the intention was to make the entailed estate or the heirs succeeding to it primarily liable for the debts, or merely to give collateral security to the entailer's creditors, and so to obviate the necessity of bringing the estate to a judicial sale. On this question the decisions are of little value as precedents, for the intention in every case must be collected from the testamentary or other writings creating the liability. The leading cases are discussed in a subsequent chapter,[4] and a general reference to them may suffice for the purposes of the present inquiry.[5]

[1] Chapter XXVI., Section III. (Imperfect Entails).

[2] As to powers of alienation by way of feus and long leases, see Section I., *supra*. The subject of powers of burdening the estate with provisions is treated in Chapter LX., Section II.; and that of the nomination of heirs in Chapter XXIV.

[3] See Chapters LXIX. and LXX., on Passive Representation, and the Liability of Heirs and Executors.

[4] Chapter LXX.

[5] See *Campbell* v. *Campbell*, 1747, M. 5213; *Hope* v. *Earl of Hopetoun*, 1799, M. "Presumption," App. No. 3; *Moncrieff* v. *Skene*, 29 June 1825, 1 W. & S. 672; *Elliot* v. *Earl of Minto*, 4 Feb. 1823,

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Discussion.

991. The heir of entail is, of course, entitled to the benefit of discussion; and unless the entailer's debts are made real or are declared to be burdens primarily affecting the entailed estate, the executry, as well as the unentailed heritage, must be first exhausted.[1]

Liability for provisions constituted by act of the entailer, or under powers.

992. Where a bond of provision is granted under a power conferred by the deed of entail, it is like an entailer's debt, and the entailed estate is liable to be attached for the principal and interest; so that an heir of entail, taking up the estate, incurs a liability commensurate with the value of the estate.[2] And where a provision constituted by the entailer is declared to be a debt binding upon his heirs of entail, the heirs-substitute of entail are individually bound by their acceptance of the grant, although it may not be competent to proceed directly against the estate.[3] Where to such an obligation there is added a clause entitling the heirs of tailzie to relief out of the general estate, and where the heir-general also succeeds to the entailed estate, he is bound to pay the provisions out of the general estate; and the obligation does not transmit against subsequent heirs of entail.[4]

Estate held unentailed and liable to adjudication and sale for debts affecting it.

993. For the liquidation of entailer's debts, or of those provisions which are charged on the estate under the powers of the settlement, resort may be had to any of the modes of distribution which are competent in relation to unentailed property. Creditors may attach the estate by adjudication, or by a process of ranking and sale.[5] In the application, however, of the Statute 1695, cap. 24, a distinction has been taken; the heir of entail may bring the estate to a judicial sale while the deed of entail is personal; but if infeftment has been taken by any of the preceding heirs, the estate is held to be protected by the Statute, lest, under the colour of a sale for debts, the heir might succeed in disentailing the estate.[6] If the deed of entail expressly empowers the heir in possession to sell for payment of such debts as are due from the estate, the Court of Session will, upon reduction of the deed of entail, grant per-

2 Sh. 180, N.E. 161; 29 June 1825, 1 W. & S. 678; *Jardine* v. *Lockhart*, 14 June 1833, 11 Sh. 720.

[1] *Russell* v. *Russell*, 1745, M. 5211, and cases cited Chapter LXIX., Section V.

[2] *Howden* v. *Porterfield*, 17 June 1834, 12 Sh. 734. An annuity granted by the entailer to his widow is held to be an entailer's debt, though it is not payable in his lifetime; *Stewart* v. *Denham*, 8 April 1742, 1 Cr. St. & Pat. 316; *Dalrymple*, 17 July 1846, 8 D. 1217.

[3] *Ker* v. *Cochrane*, 9 Feb. 1836, 14 Sh. 458.

[4] *Baugh* v. *Murray*, 14 Jan. 1834, 12 Sh. 279. And see *Macalister* v. *Macalister*, 16 Dec. 1865, 4 Macph. 245; *Farquharson* v. *Farquharson's Tr.*, 16 June 1866, 4 Macph. 831.

[5] Younger children claiming as creditors under marriage-contract provisions have, of course, the same rights as ordinary creditors; *Dundas* v. *Dundas*, 16 May 1839, 1 D. 731.

[6] *Mitchell* v. *Tarbutt*, 4 Feb. 1809, F.C.

mission to sell in terms of it.[1] Where a power is held to be given by implication, it may be necessary to have the title cleared by a declarator.[2]

Heir's life interest may be attached for his debts, and for provisions personally binding on him.

994. The debts of heirs of entail, it will be observed, may be secured upon the estate to the extent of affecting the rents during the lifetime of the debtor; and to the same effect the estate may be attached by real diligence for the debts of an heir in possession. The like procedure is competent for the purpose of operating payment of provisions which, under the powers of the deed of entail, are made burdens on the right of the succeeding heir without being permitted to become a permanent charge upon the estate.

Constitution of securities on entailed estates restricted to the heir's life interest.

995. As to the proper form for constituting a security over an entailed estate restricted to the life interest of the heir, the conveyancer will do well to follow the style sanctioned by the cases of *Nairne* v. *Gray*,[3] and *Bontine* v. *Graham*,[4] where the security was given in the form of an heritable bond, with an assignation to rents and warrant for infeftment, subject to a declaration that the annuity should not affect the lands or rents thereof for any longer period than the granter's lifetime, or be the ground of adjudication or other diligence whereby the estate might be evicted.

Rules of preference in competitions for rents between heritable creditors and creditors of heir in possession.

996. Debts of the entailer, and debts made real under the authority of the deed of entail, may of course be made to affect the rents as well as the fee of the estate, and to the extent of the arrears of interest such debts form a preferable claim upon the rents in a question with creditors of the heir in possession. With regard to the order of preference in relation to the principal, the case stands thus: In an early case [5] creditors were ranked on the rents of the estate in the following order,—1*st*, creditors of the entailer and of the institute; 2*dly*, a creditor in an annuity granted under a power by a former heir; 3*dly*, creditors of the heir in possession who had attached the rents by diligence. The creditors in the third class, finding that there was no reversion available to them, applied to the Court to have the creditors of the entailer ordained to assign their security over the fee; but the

[1] *Scott* v. *Scott's Heirs*, 1751, M. 15,394.

[2] *Graham* v. *Wight*, 21 Dec. 1850, 13 D. 420; and see *Allan* v. *Glasgow's Trs.*, 28 Jan. 1842, 4 D. 494, and the previous decision of the House of Lords, 1 Sept. 1835, 2 S. & M'L. 333.

[3] *Nairne* v. *Gray*, 15 Feb. 1810, F.C.

[4] *Bontine* v. *Graham*, 2 March 1837, 15 Sh. 712; and see *Scottish Union Insurance Company* v. *Graham*, 19 Feb. 1839, 1 D. 532. In the case of *Graham* v. *Hunter*, 14 Nov. 1828, 7 Sh. 13, it was held that a conveyance of the heir's liferent right and interest was inept, in respect that an heir of entail is not a liferenter, but a limited fiar. The observations of Mr. Sandford, in support of the view taken in that case appear to be well founded (Tr. on Entails, pp. 424-427).

[5] *Ranking of Earl of Buchan's Crs.* cited in *Earl of Buchan* v. *His Father's Crs.*, 1757, M. 15,406; Sandford on Entails, p. 419.

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application was refused. However, in the subsequent case of *Hawkins*,[1] it was ruled that a creditor whose debt is a good charge upon the fee of the estate, and who does not offer to assign his security over the fee, is not entitled to a preference over the rents, except for arrears of interest. Mr. Sandford observes that, since the payment of an entailer's debt out of the rents of the estate operates as an assignation of the debt in favour of the heir in possession, the creditors of that heir would be entitled to attach his claim, and by means of it to operate payment by adjudication or sale.[2]

SECTION IV.

Payment of Debts, whether operating as Extinction or as Assignation.

Payment operates as assignation where heir either not liable in a general character, or entitled to relief.

997. In relation to the payment of debts by heirs of entail, the most important question is, whether in any case the payment operates as an extinction of the debt, or whether it vests the *jus crediti* in the heir by whom the payment is made? The general rule is, that the distinction in the characters under which the heir paying an entailer's debt sustains the relations of debtor and creditor, is sufficient to prevent the extinction of the debt *confusione*.[3] But in order that there may be place for this distinction, it is necessary either (1) that the heir of entail should not be liable for the debt in any general character,—*e.g.*, as executor or heir-at-law; or (2) that if he is liable in either of these characters, he should be entitled to relief from the heirs of entail, as he will be where the debts are declared to be primarily chargeable on the entailed estate. Where entailer's debts are paid by an heir of entail who is also liable without relief under one of the general passive titles, they are absolutely extinguished (at least to the extent of the value of the general succession), and are incapable of being kept up against the entailed estate.[4]

How the debt may be kept up as a charge against the entailed estate.

998. Subject to the exception noticed in the preceding paragraph, it may be affirmed generally that an heir of entail who pays debts or provisions charged upon the estate out of his own funds is entitled to keep them up as a claim against the entailed estate, and that he will be held to have done so in the absence of expressions

[1] *Hawkins* v. *Graham's Trs.*, 28 May 1800, M. "Competition" App. No. 1; and see *Graham* v. *Graham's Trs.*, 21 Dec. 1850, 13 D. 420.

[2] Sandford on Entails, p. 420, note.

[3] Ersk. 3, 4, 27.

[4] *Sir W. Forbes and Co.* v. *Lord Duncan*, 1802, M. "Tailzie," App. No. 10, and *Boyd* v. *Boyd*, there cited.

of intention to the contrary.[1] If an assignation,[2] or a discharge and assignation,[3] is taken by the heir, then the intention to keep up the debts is clear. And where a creditor, at the request of the heir paying the debt, assigned the claim against the estate to his younger children, the debt was held to be good against the succeeding heirs after the elapse of sixty years, interest having been paid upon it for a sufficient time to exclude the plea of prescription.[4] And if a creditor in a debt affecting the entailed estate should succeed to the estate, the debt is not thereby extinguished *confusione;* on the contrary, his heir whatsoever will become the creditor in the obligation, and will have action upon it against the heir of provision.[5] A similar right exists on the part of a creditor who takes the entailed estate as institute or disponee of his debtor.[6] Interest on an entailer's debt, paid by an heir, becomes a debt due to the representatives, in like manner as the principal.[7]

Effect of taking a simple discharge.

999. On the other hand, if an heir of entail paying a debt due by the estate, in place of taking an assignation to it, accepts a simple discharge, it is considered that he intends to relieve the entailed estate of the debt, and it is accordingly extinguished.[8] Where a transaction of this nature is vitiated by fraud, or breach of statutory requirements, it may be opened up, and the rights of all parties are then restored to their former position.[9] Though the heir in possession is bound to keep down the interest on entailer's debts, and is primarily liable to that extent, yet if he fail to pay, the interest, equally with the principal, is a debt affecting the estate.[10]

[1] *Caddell* v. *Caddell's Trs.*, 11 July 1845, 7 D. 1014; *Crauford* v. *Hotchkis*, 11 March 1809, F.C.

[2] *Lawrie* v. *Donald*, 7 Dec. 1830, 9 Sh. 147; and see *Murray*, 1748, 5 Br. Sup. 764; *Welsh* v. *Barstow*, 11 Feb. 1837, 15 Sh. 537.

[3] *Ker* v. *Turnbull*, 1758, M. 15,551.

[4] *Dundas* v. *Dundas*, 12 June 1827, 5 Sh. 791, N.E. 731, *bis.*

[5] *Cunninghame* v. *Lady Cardross*, 1680, M. 3038; *Cuming* v. *Irvine*, 1726, M. M. 3042; *Gordon* v. *Maitland*, 1757, M. 15,411.

[6] *Viscount Strathallan* v. *Drummond*, 29 May 1828, 6 Sh. 881.

[7] *Campbell* v. *Campbell*, 29 Nov. 1815, F.C.

[8] *Wauchope* v *Duke of Roxburghe*, 14 Dec. 1815, F.C.; affirmed 9 March 1825, 1 W. & S. 41. In this case the debt was secured on the entailed estate by means of a wadset, and the case may be compared with a former decision in which the heir, having taken a conveyance to the wadset, was held to have assumed the position of the creditor in the obligation,—*Earl of Peterboro* v. *Fraser's Crs.*, 1736, M. 3086.

[9] *Cleghorn* v. *Eliott*, 12 Nov. 1840, 3 D. 1; affirmed 27 Aug. 1839, M'L. & Rob. 1033.

[10] *Campbell* v. *Campbell*, 29 Nov. 1815, F.C.; *Erskine* v. *Earl of Mar*, 7 July 1829, 7 Sh. 844; *Sands* v. *Brisbane*, 7 July 1835, 13 Sh. 1040; *Duchess of Richmond* v. *Duke of Richmond*, 2 Dec. 1837, 16 Sh. 172. To this rule there is a statutory exception in relation to the interest due on bonds and dispositions in security under §§ 17, 18, and 21 of the Entail Amendment Act.

CHAPTER XXIX.

CLAUSES OF DEVOLUTION AND OF RETURN.

1. Validity, Construction, and Effect of Devolving Clauses. | 2. Clauses of Return, Conditions of their Validity.

SECTION I.

Validity, Construction, and Effect of Devolving Clauses.

Clauses of devolution effectual as conditions of grant of heritable estate.

1000. Such clauses have reference most usually to the contingency of an heir of provision succeeding to a specified title or estate, or to any title or estate by which he is disabled from taking and using the name and arms of the entailer. For obvious reasons, a devolving clause is only efficacious when it enters into the destination of a strict entail.[1] A clause, annexed to a simple destination of an heritable subject to a plurality of persons, giving over the estate to survivors in case of the death of any of the institutes without issue, was held effectual as a condition of the grant on the principle of devolution.[2] The decisions in relation to clauses of devolution present the law of the subject in a somewhat fragmentary shape, and with a large admixture of specialties depending on the terms of the condition; but the following points are clearly established.

Devolution distinguished from resolutive clause: Effectual without declarator.

1001. A clause of devolution is different in principle from a resolutive clause, or what is commonly termed an irritancy. The devolution is held to be a condition of the original grant, and it operates *ipso facto* upon the occurrence of the contingency. The right of the heir takes effect immediately, and he is not required to constitute it by declarator.[3] In the event of the heir whose right is resolved refusing, or being unable to convey, the devolution may be enforced by action of adjudication in implement of the entail, the decree in which will give right to the rents from the period when the estate of the preceding heir was resolved.[4] The

[1] On the question whether such a clause is binding *inter hæredes* as a trust, see *Fleeming* v. *Howden*, 16 July 1868, 6 M. (H. L.) 113, reversing 5 M. 658.

[2] *Lawson* v. *Imrie*, 10 June 1841, 3 D. 1001,—the case being distinguished from *Stewart* v. *Kirkpatrick*, 1735, M. 4324, which was held to be a case of proper substitution, and not one of a qualified grant.

[3] *Viscountess Hawarden* v. *Elphinstone's Tr.*, 2 Feb. 1866, 4 Macph. 353.

[4] *Ibid.* As to the effect of the right in competition with singular successors, see

condition, which is the basis of the devolution, is, like other resolutive conditions, interpreted strictly. Therefore, where the devolution was contingent upon the event of the heir "succeeding" to a certain estate, an heir who took the estate in question under a Parliamentary contract was held not to have succeeded to it in the sense of the condition of the deed of entail.[1]

Clause of devolution effectual to exclude heir who has not already succeeded.

1002. A clause of devolution in the ordinary style is effectual to exclude an heir who is already in possession of the title or estate creating the contingency, at the time when the succession opens to him under the entail.[2] Thus, a clause devolving the estate in the event of any of the heirs in a certain branch of the destination succeeding to a peerage, was construed to apply to the case of a peer succeeding to the entailed estate, and decree of declarator was pronounced at the instance of the next heir, finding that he was entitled to be served heir of tailzie and provision to the last heir, on the ground that his elder brother, being a peer, stood excluded by the terms of the entail.[3] In a previous case,—where an entail provided that when the estate came to the family of F., the entailed estate and the estate of F. should be held by separate heirs, and in that event the entailed estate should devolve on the next heir,—the decree establishing the right of the next heir ordained the defender to make up titles and convey to the next heir. This decree was affirmed in the House of Lords, and adjudication followed upon it.[4]

Heir entitled to elect between the two estates.

1003. Where the devolution is contingent upon succession to a particular estate, the heir is entitled to elect which estate he will take. This is settled by the judgment in *Stirling* v. *Stirling*,[5] by which it was found, "That the defender is not entitled to hold both of the estates of M. and C.; that the clause of devolution in the entail of M. applies to the defender, as having succeeded to the estate of C.; but that he is, notwithstanding, entitled to make his election of, and to hold either of the said estates, upon condition

Stewart v. *Nicolson* (Carnock), 2 Dec. 1859, 22 D. 72.

[1] *Hastings* v. *Marquis of Hastings*, 7 D. 1; 9 March 1847, 6 Bell, 30.

[2] *Gilmour* v. *Lockhart*, M. 15,404; 12 Feb. 1756, 1 Pat. 610; *Fleming's* case, *infra*.

[3] *Fleming* v. *Lord Elphinstone*, 1804, M. 15,559.

[4] *Henderson* v. *Henderson* (Earlshall), M. 4215; 11 May 1791, 3 Pat. 686. It is stated that in this case the heir, who made up his title by adjudication, conceiving that he thereby took the estate in the character of *a disponee*, attempted to break the entail, on the ground that the restraining clauses were only applied to *heirs;* but in this contention he was unsuccessful,—3 Pat. 690, note. It would therefore appear that a clause of devolution is not to be regarded as a conditional institution, but as a *conditional substitution* of heirs of provision. A somewhat similar plea to this was unsuccessfully maintained in the case of *Munro* v. *Munro* (Fowlis), 4 Sh. 467, N.E. 472; 25 July 1828, 3 W. & S. 344.

[5] *Stirling* v. *Stirling* (Milton), 16 Jan. 1834, 12 Sh. 296, see p. 300.

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of his renouncing all right of succession to the other in favour of the pursuer as the next substitute heir of entail."

Younger son not entitled to exclude collateral heirs unless expressly substituted.

1004. The devolution of the estate must take place in favour of the person or heir pointed out by the terms of the entail, although the person to whom the two successions open may have younger sons nearer the line of succession, whose possession would carry out the intention of the testator of having the two estates separately possessed.[1] Devolution is subject to the ordinary law of heritable succession according to which the birth of a nearer heir suffices to divest an heir who stood next in order in the succession when he took up the estate. The right to divest depends on the destination of the devolved estate.[2] It would further appear that an heir of entail cannot, by electing to renounce an estate in favour of collateral heirs, deprive his descendants of the succession, in the case of their being entitled to come in under the same or a subsequent branch of the destination,[3] and to take the estate consistently with the terms of the entail.[4]

Devolution from the person succeeding, and heirs-male of his body, to the next heir, operates in favour of second son.

1005. A clause of devolution obliging the heir succeeding to the other estate, *and the heirs-male of his body*, to denude in favour of *the next heir*, has not the effect of excluding all the male descendants of the body of the person so succeeding, but only those in the direct line of male descent. Under such a clause, therefore, the estate will devolve to a second son or grandson of the person excluded from the succession.[5] And where it was provided that the right of any heir of entail succeeding to certain estates or titles should cease at the next term after he should have succeeded, " or in his option, next after he shall have a second lawful son attained to the age of fourteen years, during which space I herewith dispense with the said heir of entail his using my surname and coat armorial," the heir in possession, in succeeding to the estate and title, was found entitled to keep the entailed estate during his life, if he had not a second son born to him, or if he should have one, then until the son had attained the age of fourteen.[6] The two

[1] *Lawrie* v. *Macghie* (Redcastle), 17 March 1763, 2 Pat. 309.

[2] *Logan Home* v. *Logan*, 1880, 7 R. 1137.

[3] *Marquis of Bute* v. *Wortley* (Rosehaugh), 4 March 1803, 4 Pat. 450.

[4] *Fullarton* v. *Hamilton* (Bargany), 20 June 1825, 1 W. & S. 410. The case in its prior stages is reported in M. 11,171, 4 Pat. 175, 1 Sh. (App. Ca.) 265, and 2 Sh. 265, N.E. 235 ; also in an Appendix to 1 W. & S. In this celebrated case Lord Eldon's characteristic tendency *to doubt* attained its maximum development. The case was three times remitted to the Court of Session ; and the judgment of the majority of the Court was finally affirmed in a speech in which it is difficult to discover anything but the confusion and hesitation of a mind swaying from one extreme to the other, and vainly seeking an intermediate resting-place.

[5] *Leslie* v. *Leslie* (Balquhain), 29 April 1742, 1 Cr. St. & P. 324.

[6] *Hay* v. *The Marquis of Tweeddale* (Linplum), M. 15,425, 6 April 1773, 2 Pat. 322.

cases noted below raise only questions of the meaning of the clause of devolution in the particular entail, but may possibly have a bearing on the decision of future cases.[1]

Until devolving condition takes effect, heir in possession has all the powers of a limited fiar.

1006. With reference to the powers of an heir of entail whose estate is liable to be resolved by his succession to another estate or title, the case of *Bourtrechill* is a leading authority.[2] In this case it was held that an heir of entail who, in the case of his succeeding to a certain peerage, is allowed to keep the estate until the birth of a second son to whom it is to devolve, has, until such son is born, all the rights of an heir-substitute; and that, if not effectually prohibited, he may sell the estate,—the case being distinguished from that of *Mackinnon*,[3] where the birth of a nearer heir than the heir in possession was held to resolve the right of the latter *ab initio*. Also, where an heir in possession was presumptive heir to a peerage, his succession to which would cause the devolution of the estate from him and his "heir-apparent," it was held that the heir-apparent was entitled to give the statutory consent to a deed of disentail.[4] It is not a fair exercise of a power given to an heir of entail of burdening the estate with provisions for his family, to grant provisions contingent on the event of the granter losing his right by succession to a different estate.[5]

Devolution after the estate has opened to creditors under Entail Amendment Act.

1007. Where an entail is defective in any of the statutory solemnities, so that the estate is exposed to the diligence of creditors, it was supposed that the rights of creditors would not be affected by a subsequent devolution of the estate. But the judgment to this effect was reversed, on the ground that the clause of devolution put an obligation on the heir in possession to denude when the event occurred, and that the trustee on his estate could take no higher right than such as was vested in the bankrupt.[6]

SECTION II.

Clauses of Return.

Import and effect of such clauses.

1008. The construction of clauses of return is not of much practical importance, nor is there much to be explained regarding

[1] *Nicolson* v. *Arbuthnott*, 1878, 5 R. 872; *Campbell* v. *Campbell*, 1868, 6 Macph. 1035.

[2] *Lord Montgomerie* v. *Earl of Eglinton*, 7 D. 425, and 9 D. 1167; 8 July 1847, 6 Bell, 136.

[3] *Mackinnon* v. *Mackinnon*, 1756, M. 6566. Compare *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 72.

[4] *Forbes* v. *Burness*, 1888, 15 R. 797.

[5] *Earl of Cassillis* v. *Hamilton*, Elch. "Provisions to Heirs," No. 6; 21 March 1745, 1 Pat. 381.

[6] *Fleeming* v. *Howden*, 16 July 1868, 6 Macph. (H.L.) 113; reversing 5 Macph. 658. In such a case, it seems the heir on whom the entail devolves has the same rights as any substitute succeeding to the estate by a death; *Munro* v. *Butler-Johnston*, 1868, 7 Macph. 250.

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them. The effect of a clause of return, in a destination of lands or in a bond of provision, is different in different circumstances. Sometimes it is held to be nothing better than a simple destination, defeasible by gratuitous deeds of alienation. Sometimes it is held to bar gratuitous alienations or conveyances, so that a clause of return may have a higher effect than a substitution unprotected by irritant and resolutive clauses.

Cases distinguished.

1009. The best exposition of the subject is that given in the case of *Mackinnon Campbell*[1] by Lord Medwyn, who lays down the following propositions :—1. If the conveyance or grant be onerous, fulfilling a legal obligation, a clause of return is considered gratuitous, without any just consideration, and may be defeated gratuitously.[2] 2. If the grant be gratuitous, without any antecedent obligation, a clause of return is held to be a condition of the grant, so that the grant must be taken and held *secundum formam doni*, and cannot be defeated by any gratuitous act of the donee. 3. If the clause of return be not in favour of the granter himself, but to a third party, it is held to be gratuitous in his person, without any due consideration given by him for it, and it is therefore defeasible by the grantee or substitute. 4. If the clause of return, even in a gratuitous grant, does not immediately follow the grant to the grantee and his heirs, but there are other substitutes prior to the clause of return, it may be defeated gratuitously by the grantee or his heirs, as the substitutes have no sufficient *jus crediti* to prevent the alienation, and, of course, the granter and his heirs have no right, as their interest has been by his own act still further postponed.[3] The decisions are unfavourable to the extension to pecuniary provisions of the special rules applicable to clauses of return. The use of the word "return" is not regarded as material, and in the two latest cases on such clauses the direction to return a sum of money was in the one case held to be a defeasible substitution, and in the other to be equivalent to a declaration that the sum should fall into residue in the event of the beneficiary not exercising a power of disposal of the fund.[4]

[1] *Mackay* v. *Mackinnon Campbell's Trs.*, 13 Jan. 1835, 13 Sh. 246.

[2] *Lowrie* v. *Borthwick*, 1683, M. 4339 ; *Lewis* v. *Laurie*, 1736, 5 Br. Sup. 161 ; *Sinclair* v. *Sinclair*, 1738, M. 4344 ; *Duke of Hamilton* v. *Douglas*, *infra*.

[3] Per Lord Medwyn, 13 Sh. 250, citing *Paton* v. *Nairne*, 1728, M. 4324, and *Edgar* v. *Johnstone*, 1736, M. 4325. On the subject of clauses of return, see also *Duke of Douglas* v. *Lockhart*, 1717, M. 4343 ; *M. of Clydesdale* v. *Earl of Dundonald*, M. 1262 (Branch 1) ; 2 April 1726, Roberts. 564 ; *College of Edinburgh* v. *Mortimer*, 1685, M. 4342 ; *Duke of Hamilton and Earl of Selkirk* v. *Douglas*, M. 4358-10,962 ; 27 March 1779, 2 Pat. 449 ; *Duff* v. *Gordon*, 1807, M. "Member of Parliament," App. No. 13 ; *Johnstone* v. *Irving*, 22 June 1824, 3 Sh. 163, N.E. 110 ; Dirleton and Stewart, p. 367 ; Kames' Eluc., art. 12, "Clause of Return."

[4] *Buchanan's Trs.* v. *Dalziel's Trs.*, 1868, 6 M. 537 ; *Barr's Trs.* v. *Barr's Trs.*, 1891, 18 R. 541.

CHAPTER XXX.

SERVICE OF HEIRS OF PROVISION AND ENTRY.

1. Entry of Heirs, in what Cases requisite.
2. Rule that Entry must be in the proper Character.
3. Right of subsequently born Heir to divest entered Heir.
4. Possession on Double Titles.

SECTION I.

Entry of Heirs, in what Cases requisite, and to what Ancestor.

Title to expede a service as heir of provision.

1010. By the operation of the Conveyancing Act, 1874,[1] rights of succession to land vest without service, and the subject of the entry of heirs is now rather a part of the law of conveyancing than of succession. A brief reference to certain questions of principle may therefore suffice for the purposes of this work. It may here be noticed that the Act of Parliament makes no change in the law as to the title of a claimant to service, nor in the procedure introduced by the Service of Heirs Act, 1847. Titles to heritable bonds may be completed by service, as heretofore, although to certain effects such bonds are now moveable succession.[2] The fact that the same question of pedigree is depending before the House of Lords, or the Committee of Privileges, is not a sufficient reason for the Sheriff declining to exercise his jurisdiction or staying proceedings.[3] Nor can a service as heir of entail and provision be stayed on a representation that the special subject is carried by a general disposition, if the efficacy of the general disposition depends on the question whether there is a good entail.[4] In all such questions it was the policy of the law to permit, if possible, the immediate service of the heir, in order that his right might be vested, leaving the question of right to be determined by competing declarators, reduction of the service, or other competent process of law.

Service not requisite in case of a person taking as disponee.

1011. The proper object of a service as heir of provision is to take up an estate or right of succession from the *hæreditas* of a

[1] See Chapter V. (Vesting of the Heritable Succession).

[2] *Hare* Petr., 1889, 17 R. 105.

[3] *Maitland* v. *Maitland*, 1885, 12 R. 899.

[4] *Mackenzie* v. *Catton*, 1870, 8 R. 457.

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deceased person who possessed under a title regulating his succession. This excludes three cases, namely,—(1) where the inheritance is that of a person who possessed on a title in favour of himself and his heirs, in which case the title falls to be made up by service as heir-at-law; and (2) where the successor is the disponee of the proprietor last in possession, in which case the fee vests by the words of the testamentary instrument in the disponee, no service being necessary to connect him with the ancestor. (3) Service was not considered necessary in order to take up a right accruing by survivorship, because on the death of one of the joint owners the fee expands.[1] Where a title to heritable estate is to be completed in any other character than that of heir-at-law, it is necessary to determine whether the successor is a disponee or an heir of provision; and, if an heir of provision, then to what ancestor, it being essential that the service should be expede to the person in whom the estate was last vested in fee.

Case where the maker of the settlement disponed to himself.

1012. Where the maker of the settlement is himself the institute, no question can arise. Thus, if a testator dispone to himself, whom failing to A., whom failing to B., &c., whether the succession opens to A. at the death of the maker, or whether it opens immediately to B. in consequence of the predecease of A., in either case the successor must serve heir of provision to the maker of the deed.[2] The case is precisely the same where the settlor, instead of disponing to himself, obtains a charter from the superior with a destination to himself as institute, whom failing, to other persons or heirs. In such a case a title made up by the infeftment of the first heir-substitute, without previous service to the maker of the settlement or disponee of the charter, would be inept. The rule is not altered by the obligation to infeft being expressed in favour of the *nominatim* substitutes, and not in favour of the granter,—the dispositive being the ruling clause.[3] In a disposition to the granter himself and persons named, the word "and" means *whom failing*, and the title of the *nominatim* substitutes must be completed by service.[4]

Case where the immediate disponee predeceases the disponer.

1013. The difficulty arises where a testator disponed to a person who predeceases him, or to heirs who fail, whether by predecease or by non-existence, whom failing, to other heirs or persons. In such

[1] *Bisset* v. *Walker*, M. "Deathbed," App. No. 2.

[2] *Hamilton* v. *Hamilton*, 1714, M. 14,360. The reversal of this case after an *ex parte* hearing, noticed in Roberts. 493, proceeded entirely on specialties, and is of no authority; per Lord Cowan, 5 Macph. 1111, *infra*. See also *M'Culloch* v. *M'Leod*, 1731, M. 14,366; *Livingstone* v. *Lord Napier*, M. 15,409; 11 March 1765, 2 Pat. 108.

[3] *Young's Trs.* v. *Young*, 19 July 1867, 5 Macph. 1101.

[4] *Gordon* v. *M'Culloch*, 1791, Bell's Oct. Ca. 180; *Young's Trs.* v. *Young supra*.

a case the settlement comes into operation at the testator's death in favour of the "eldest" surviving member of the destination, and the conveyance necessarily lapses as regards those antecedent branches of the destination which have failed in the testator's lifetime. The person entitled to the succession is clearly in the position of a conditional institute succeeding under the disposition to himself, and not as heir to any previously named disponee; and his title will therefore be completed by sasine on the disposition. Why any difficulty should have been felt in admitting the proposition that a substitution implies a conditional institution of the same person, in the event of his being the first taker, it is not easy to understand.[1] The point is now settled by authority, and reference is made to a preceding chapter, where the cases are noticed.[2]

To whom is service as heir of provision to be expede. Proper destination in liferent and fee.

1014. A difficulty, distinct from the one involved in the question of conditional institution, but occasionally combined with it, sometimes arises in the case of destinations to parents in liferent, and their children in fee,—the question being, who is the ancestor to whom service ought to be expede? Where a proper liferent is constituted by a conveyance to one person in liferent, and to another *nominatim* in fee, the liferent is only a burden, the fiar's interest vests, and it may be taken up by his successor by service in the proper character.[3] If the deed is of a testamentary character, the predecease of the institute opens the succession to the next member of the destination in the character of conditional institute. But where the destination is to a person in liferent, and to his children *nascituri* or unnamed in fee, the intention is held to be to give the fee to the parent as institute and to the children as substitutes; and the children's title is made up by service as heirs of provision, precisely as if the fee were given to the parent in express words.[4] The distinction is illustrated by the case of *Lindsay* v. *Dott*,[5] where the destination was to A. in liferent, and to B. also in liferent, and to the heirs procreated or to be procreated of the body of B. In this case, the liferent given to A. was held to be a proper liferent, while the right of B. (nominally a liferent right) was held to be a constructive fee in his person, and the next heir was obliged to serve heir of provision to him.

[1] Chapter XXIV., Section IV. (Construction of Destinations).

[2] For an illustration of the application of this principle to conjunct rights, see *Main* v. *Lamb*, 1880, 7 R. 688.

[3] Chapter, XXIV., Section IV. (Heritable Destinations).

[4] And where a *nominatim* fiar is instituted along with children *nascituri*, the fee vests in the *nominatim* institute for behoof of himself and the other members of the destination. See *Macgowan* v. *Robb*, 29 March 1864, 2 Macph. 943; *Martin's Trs.* v. *Milliken*, 24 Dec. 1864, 3 Macph. 326.

[5] *Lindsay* v. *Dott*, 1807, M. "Fiar," App. No. 1; *Dennistoun* v. *Crichton*, 5 Feb. 1824, 2 Sh. 678, N.E. 570.

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Destinations limited to liferent use allenarly, the fee being given to persons unborn.

1015. Where the destination is to a father in liferent for his liferent use allenarly, and to his children in fee, the nominal liferenter, in addition to his proper life interest, takes a fiduciary fee; the condition of the trust being, that he shall hold the fee for the heirs of the marriage, if there are any, and if there be none, then for behoof of himself absolutely, or of the party from whom the estate is derived. In such a case it is held that the heir or children may make up titles by special service as heir of provision to the parent;[1] and it would seem that the estate may also be taken up by declaratory adjudication.[2] And the destination being as stated, if the father has taken infeftment in favour of himself in liferent only, without noticing the right of fee, the eldest son will make up his title by a *general service*, the precept, *quoad* the fee, being held to be still unexecuted.

Specialty in the case of entails.

1016. In questions of beneficiary interest or of rights under entails fiduciary fees are ignored. Thus, where the destination of an entail was conceived in favour of a lady in liferent only, and her second son (unnamed and unborn) in fee, the second son was held to be the institute, and so not bound by the fetters of the entail, which were directed against heirs only.[3]

Destination under a trust for creditors.

1017. Again, where a fee has become divided in that peculiar way which results from the execution of a trust for payment of debts and retrocession, a title obtained by an heir from or through the trustee is valueless, because the trust is a mere burden on the truster's title. In such a case the heir ought to serve to his ancestor ignoring the trust.[4]

SECTION II.

Of the Rule that the Entry must be in the proper Character.

Service as heir of provision must have re-

1018. In all cases where the destination of an estate is in favour of a selected class of heirs, service *as heir of provision* is

[1] *Dundas* v. *Dundas*, 23 Jan. 1823, 2 Sh. 145, N.E. 133; *Barstow* v. *Stewart*, 18 Feb. 1858, 20 D. 612. And see *Gilmour* v. *Gilmour*, 14 Jan. 1864, 2 Macph. 412.

[2] Adjudication seems to be the most appropriate method where the fee is given to all the children; service when it is confined to one individual, or to daughters in the character of heirs-portioners. In the case—which does not often happen—of a subject being left to an individual by name conjunctly with a family of unborn or unnamed children, the *nominatim* disponee takes a fiduciary fee for himself and his co-disponees, the interest of the latter vesting at birth; *Martin's Trs.* v. *Milliken*, 24 Dec. 1864, 3 Macph. 326. In such a case, the title of the children would be made up by a conveyance from the *nominatim* disponee, and in default, by adjudication.

[3] *Logan* v. *Logan*, 15 Sh. 291; 1 Aug. 1839, M'L. & Rob. 790.

[4] *Gilmour* v. *Gilmour*, 1873, 11 M. 853.

necessary to vest the right of the heirs-substitute, which service, as we have seen, is to be to the person last vest and seized in the fee, whether under a feudal or under a personal title. And the rule is not varied by the circumstance that the heir of provision happens also to be the heir-at-law of the person last seized; for if the succession is regulated by deed, the service must have relation to that deed, and must identify the person entered as the heir pointed out by the destination. Thus, where the destination is to A. *and the heirs of his body*, for two generations at the least the tailzied succession runs in the channel of the legal order of succession. But in the service A.'s eldest son will be described as nearest and lawful *heir of provision* to A., under the deed regulating the succession.

Relation to the settlement, and must connect the heir with it.

1019. Thus, in one of the branches of the *Elshieshiels* case,[1] the question was, Whether a service by a son in the character of *heir-male* to his father was a good title to estate which was destined to the heirs-male *of the father's second marriage?* In point of fact, he was a son of the second marriage, but this did not appear *ex facie* of the proceedings; the service was held inept, and a deed of alteration of the succession by a descendant whose title depended on this service was held bad, as flowing *a non habente protestatem*. Again, in *Cathcart* v. *Earl of Cassillis*,[2] the service of Earl David in 1776, *tanquam legitimus et propinquior hæres masculus et lincæ* (without the word *provisionis*) was held not to give a vested interest in the estate of Culzean, which was destined to the said Earl *nominatim* by the disposition of 1748 mentioned in the report. In an early case, where the heir's character, established by his service, *necessarily implied* that he possessed the character required in the deed of provision, the service was sustained as equivalent to a service in the proper character. This was the service of a son as nearest and lawful heir to his father, which was held to be sufficient to vest the succession under a destination to the father and the heirs-male of his body.[3]

Where description incomplete, whether it is sufficient that possession of the proper character may be inferred from the words of the service.

1020. But the general rule undoubtedly is, as laid down by Lord Eldon in the case of *Cathcart*,[4] that the service ought to be in the true legal character, and not merely in a character which by implication infers the existence of that character.[5] And there-

Rule laid down in *Cathcart* v. *Cassillis*.

[1] *Edgar* v. *Maxwell*, 1738, M. 14,015.

[2] *Cathcart* v. *Earl of Cassillis*, 1802, M. 14,447, and on appeal 24 Nov. 1807, 2 Ross' L. Ca. 525; 1 W. & S. 239; see also *Duke of Queensberry's Trs.* v. *Earl of Wemyss*, 21 Jan. 1819, Hume, 727.

[3] *Haldane* v. *Haldane*, 1766, M. 14,443; but see *Colvin* v. *Alison*, 1796, Hume, 723. Conversely, a service of the heir-at-law in the character of *heir of provision* was found to be sufficient; the destination being to the heirs and assignees of the person last seized; *Bell* v. *Carruthers*, 1749, M. 14,016.

[4] 2 Ross' L. Ca. 545.

[5] Prof. Montgomerie Bell suggests, on

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fore, even where there are two deeds, with special destinations applicable to different estates, and in these deeds the destinations are actually the same, a service as heir of provision under the one deed does not operate or imply service under the other deed, or vest the right conferred by it.[1] This rule is identified with the maintenance of the doctrine of passive representation. When a person enters as heir of provision under a particular deed, he becomes liable for all that is imposed on him by that deed. But there may be other deeds, with the same destination, containing obligations to which he does not choose to subject himself, and the law does not concede to the heir the right of serving under an indefinite designation which may be made applicable to one or more of the estates destined to him in his option.

Effect of service of heir-male general without reference to a particular deed of provision.

1021. To this rule there is, however, an exception in the case of destinations to heirs-male general. The character of heir-male has from ancient times been to a certain extent recognised by the common law, particularly in relation to the descent of honours, and it is held to constitute a line of inheritance which may be the subject of a service independently of the provisions of any particular deed. Where, accordingly, a person is served heir-male general, the service is held to connect him with all estates destined to him under that character, whether to the effect of vesting the right of succession or of subjecting him to the liabilities attaching to the heirs-substitute of the tailzied estates.[2]

Precepts less strictly construed than services in relation to description of character.

1022. The rule that the character in which the heir enters must appear *ex facie* of the title, has not been so strictly applied to precepts of *clare constat*. The precept necessarily identifies the estate, and very generally the settlement or deed of investiture on which the title is expede. It has been considered sufficient that the precept is granted to the right heir, though he is not described as he ought to be in a service,[3] especially when the precept is preceded by a clause of confirmation narrating the destination.[4]

the authority of an opinion of Lord Rutherfurd, that the case of *Haldane* is overruled by that of *Cathcart* (Lectures on Conveyancing, p. 1014). The question is, whether the case is overruled, or whether it constitutes an equitable exception to the rule; and, if so, to define the limits of the exception. If the case is of any authority, it must go to this—that where three estates are destined, one to heirs-general of the body, another to heirs-male of the body, and a third simply to heirs-male, the service of a son to his father as heir-at-law implies a service as heir of provision in these three distinct characters, on the ground that an eldest son is necessarily heir of the body and heir-male. It is impossible to rely upon a case which leads to results so inconsistent with the principles of conveyancing.

[1] *Lord Elibank* v. *Campbell*, 21 Nov. 1833, 12 Sh. 74.

[2] Per Lord President Campbell in *Cathcart* v. *Cassillis*, 2 Ross' L. Ca. 535; *Anderson* v. *Anderson*, 22 June 1832, 10 Sh. 696.

[3] *Durham's Trs.* v. *Graham*, 1798, M. 15,118; *Crichton's Crs.* v. *Wood*, 1798, M. 15,115.

[4] *Ogilvy* v. *Ogilvy*, 5 June 1817, Hume, 724.

Under a destination to A. and his heirs, A.'s heirs-general do not take as heirs of provision.

1023. A disposition to A. and his heirs whatsoever, or heirs and assignees, is not a destination; and the heir of A. ought not to serve heir of provision, but heir-at-law. As in one of the branches of *Cathcart* v. *Cassillis*,[1] where the investiture being by Crown charter (dated 1774) in favour of Thomas *comes de Cassilis, et hæredibus suis et assignatis quibuscunque*, service was expede by his brother, *tanquam legitimus et propinquior hæres masculus et lineæ*, and the title was held to be unexceptionable. The circumstance that other heirs are named after heirs whatsoever appears to be of no consequence, heirs whatsoever being inexhaustible and excluding remoter substitutes. This consideration shows how erroneous is the decision in *Woodmass* v. *Hislop's Trustees*[2] holding a service to A. inept, under a destination "to A., his heirs and assignees," because it did not bear to be a service *as heir of provision*. Had the destination been to A., whom failing, to the heirs of B., B.'s heir-at-law must have served heir of provision to A.; but where an heir-at-law serves as such to his own ancestor, he is not an heir of provision, and ought not to be served in that character.

Service must specify the deed of provision under which the character is claimed.

1024. The considerations which led to the recognition of the rule that the retour or decree of service of an heir of provision must specify the character in which he is served, also require that the same instrument should specify the deed of provision from which the right is derived. In two early cases, services of heirs of provision were sustained although the retours did not specify the deeds containing the destinations;[3] and one of the reports bears, that on examination of the Chancery record a great number of retours were found which were defective in this particular.[4] The decisions can only be referred to *communis error*, and the correct practice was restored by the Service of Heirs Act,[5] which requires that in the petition for service the deed or deeds of provision shall be distinctly specified.

SECTION III.

Of the Right of a Contingent or subsequently born Heir-Substitute to divest an Entered Heir.

Distinction between testate and intestate

1025. It has been seen that, in the case of a succession accruing by operation of law, the nearest heir in existence at the opening of

[1] *Cathcart* v. *Cassillis*, M. 14,447; 2 Ross' L. Ca. 525, 1 W. & S. 239.

[2] *Woodmass* v. *Hislop's Trs.*, 28 Jan. 1825, 3 Sh. 476, N.E. 331.

[3] *Forbes* v. *Maitland*, 1753, M. 14,431; *Hay* v. *Hay* (Linplum), 1758, M. 14,369.

[4] M. 14,373.

[5] Now incorporated with the Conveyancing Act, 1874.

CHAPTER XXX.

succession in relation to divesting of heirs

the succession has the capacity of acquiring an indefeasible title; and that, if he completes his entry before a nearer heir is born or conceived, he will not be under any obligation to denude in favour of a nearer heir subsequently procreated.[1] The contrary supposition involves the recognition of the principle of conditional vesting, a principle unknown to the common law, and therefore incapable of modifying the course of an intestate succession. But the conditions of the question are different where the succession takes place under a deed of destination. The entailer may vest the estate conditionally in his heirs of provision, subject to devolution in certain contingencies; and the contingency of the birth of a nearer heir may be a cause of devolution,—the question always being whether it is so in the intention of the entailer. The authorities establish the doctrine that the *general intention* to prefer a nearer to a more remote heir is sufficient to imply an obligation to denude on the happening of the event of the birth of a nearer heir, where there is nothing in the entail to show that the heirs of provision were in every event to take an indefeasible interest. The case of *Mountstewart*[2] is not a very satisfactory authority for the proposition, as it appears from the report that the nearer heir (who was ultimately found entitled) was *in utero* at the time of the service of the remoter heir; but the principle was argued at great length, and the case was considered a *cause célèbre* by the lawyers of the time.[3]

Results of the decisions.

1026. The question was, however, authoritatively determined in favour of the subsequently born heir in the case of *Mackinnon*, which is thus stated by the reporter: The estate of Mackinnon stood disponed to John Mackinnon younger, and the heirs-male of his body; whom failing, to any other son of the body of John Mackinnon elder; whom failing, to John Mackinnon, tacksman of Mishinish. On the death of John Mackinnon younger without issue male, Mishinish served as nearest and lawful heir-male of provision, and was infeft. Afterwards, a son being born to old Mackinnon, the tutors of the child brought an action against Mishinish to denude of the estate in favour of their pupil. It was pleaded for Mishinish that, he being nearest heir to the deceased at the time, the possibility of a nearer heir's existence was no bar to his service; and that, as the entering heir is a *modus acquirendi dominii*, it must be perpetual in its effects, and no contingency happening afterwards will overturn it.[4] The terms of the judg-

[1] Chapter V., Section II. (Vesting of the Heritable Succession); *Grant* v. *Grant's Trs.*, 2 Dec. 1859, 22 D. 53.

[2] *Lord Mountstewart* v. *Mackenzie*, 1707-1710, M. 14,903-14,926.

[3] Fountainhall's report of the case commences—"This is the famous debate and competition for the deceased Sir George Mackenzie's of Rosehaugh's estate," &c.

[4] *Mackinnon* v. *Mackinnon*, 1756, M. 14,938 and 6566.

ment are quoted in the report of a subsequent action between the same parties; it was found "that upon the pursuer's birth the defender's right to the estate of Mackinnon resolved and became void; that the pursuer has right to the said estate from the time of his birth, and that he may make up his titles to the estate as if the defender had never been entered."[1] According to Lord Kames, whose reasoning substantially coincides with the views expressed by Lord Colonsay in a later case,[2] the solution of the present case depends on this question: "In a destination of succession, what is precisely intended by the clause *quibus deficientibus?* Is the person substituted in that event entitled to enter when there is no nearer heir in existence; or must he have patience till the whole persons called before him be exhausted? The latter is, no doubt, *the natural construction;* for a man must be whimsical who should choose to have the succession to his estate governed by chance. . . . According to this construction, there is no place for a substitute while there is a nearer in hope, though not existing."[3]

Heir divested after service or entry has the rights of a *bona fide* possessor.

1027. In principle, it is clear that the entered heir, until he is lawfully divested, has the equities of a *bona fide possessor*, and is therefore entitled to retain the rents reduced into possession during his tenure of the estate, and (in the case of a proprietor of a fee-simple estate) to obtain compensation for fair meliorations. Whether he has the higher rights of an heir-apparent is an undetermined question.[4] In the sequel of the case of *Mackinnon*, a sale of a part of the estate by Mishinish, the heir whose right was afterwards resolved, was sustained, but upon this medium, according to the opinions of the majority of the Court, "that the sale to Sir James M'Donald, though an extraordinary act of administration, was yet a necessary act to save the family estate from being torn to pieces by the creditors," of which they were satisfied from evidence produced in Court.[5] A claim by the widow of Mishinish for payment of a jointure of 400 merks, provided to her in her contract of marriage, was likewise sustained; "in which," says the reporter, "as it appeared to me, the Judges were swayed more by compassion than by law."[6]

Stewart v. *Nicolson.*

1028. In the case of *Stewart* v. *Nicolson*, the Court reduced a sale by one of the heirs in possession to his brother, which was effected before the birth of the heir by whom the seller was divested; but the judgment, finding that the estate was strictly

[1] M. 5280.

[2] *Stewart* v. *Nicolson*, 22 D. 94-95.

[3] M. 6567-8.

[4] See the observations of Lord Deas on this point, 22 D. 112.

[5] *Mackinnon* v. *M'Donald*, 1765, M. 5279; see p. 5284; affirmed on appeal, 25 Feb. 1771, 2 Pat. 252.

[6] M. 5285; also in *Macdonald* v. *Mackinnon*, M. 5290.

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entailed, would, in any view, have been a sufficient reason for setting aside the attempted alienation. In the opinion of Lord Colonsay, the title of the seller is assimilated to that of a person who is lawfully served heir of provision, but is afterwards divested by the operation of a clause of devolution.[1] The subject may be closed with a citation from his Lordship's opinion on the element of knowledge on the part of the purchaser: "There is the interest of the purchaser also to be dealt with; and if he is a *bona fide* purchaser, transacting with a party who has a right qualified by conditions limiting him—not made patent to the purchaser—not under an entail recorded, it may be that the purchaser's right cannot be cut down, although the party who sold was under these conditions. I do not see that there is any reason to hold here that there was no actual sale intended between the parties. But still that does not solve the question; because, although there was a real sale between the parties, it might be a sale which both of the parties were perfectly conscious was in contravention of the rights under the deeds. I rather think that such must have been the position of the parties here."[2]

SECTION IV.

Effect of Possession on Double Titles.

Personal destination not evacuated by completing title as heir-at-law; *secus*, where heir renews the investiture or disponed the estate.

1029. This part of the subject is treated in a previous chapter on Heritable Destinations.[3] We shall, therefore, merely recapitulate the three leading propositions which are there examined. Where an heir of provision makes up his title as heir-at-law, or under the subsisting investiture, neglecting a personal deed of settlement from which his right really flows, he is held to possess on both titles,—on the feudal title as heir-at-law, and on the personal title as disponee or heir of provision of the settlement. And (1) the completion of a title as heir-at-law, by entry with the superior, is held not to have the effect of evacuating the destination in the personal deed;[4] (2) where an heir who makes up his title by service or precept under the subsisting investiture afterwards obtains a new investiture from the superior by charter of resignation, the destination in the personal deed is evacuated, and

[1] *Stewart* v. *Nicolson*, 2 Dec. 1859, 22 D. 72; see p. 94. A case of the birth of a nearer heir after a clause of devolution had taken effect occurred in *Logan Home* v. *Logan*, 1880, 7 R. 1137. The child was held entitled to the estate.

[2] 22 D. 95.

[3] Chapter XXV. Section I.

[4] *Smith and Bogle* v. *Gray*, 1752, M. 10,803; *Durham* v. *Durham*, M. 11,220; 5 March 1811, 5 Pat. 482; *Zuille* v. *Morrison*, 4 March 1813, F.C.

the succession will be regulated by the destination in the charter; (3) the same result follows where the heir, without making up a title under the personal deed, dispones the estate either to himself or another person as institute, with a destination different from that of the personal deed.[1]

[1] *Edgar* v. *Maxwell* (Elshieshiells), M. 3089; 31 May 1742, 1 Pat. 334; *Harvie* v. *Craig Buchanan*, 12 Dec. 1811, F.C.; *Molle* v. *Riddell*, 13 Dec. 1811, F.C.

PART VI.

LEGACIES, FAMILY PROVISIONS, AND RESIDUE.

CHAPTER XXXI.

OF LEGACIES AND RESIDUE.

1. Classification of Legacies. (General, Demonstrative, &c.)
2. Annuities. (How Chargeable: When susceptible of being Capitalised.)
3. Rights of Legatees: Interest payable on Legacies.
4. Order of Preference of Legatees, and Abatement of Legacies.
5. Residue. (Entire or in Shares: Given in money, or in forma specifica.)

1030. Reserving for examination in subsequent chapters some of the more special and intricate questions connected with the subject of legacies, we proceed in a general view of the law of legacies to the consideration of the relations of law pertaining to the constitution of legacies, their classification, and the nature and extent of the interest or estate of the legatee.

SECTION I.

Classification of Legacies. (General, Demonstrative, Legacy of Heritage, Specific).

1031. A legacy may be declared either in a testamentary writing or in a delivered assignation intended to take effect after death (called *donatio mortis causa*), or verbally to the extent of £8 : 6 : 8.

Legacy may be constituted by a direction to trustees, or by words of bequest or disposition.

1032. A testamentary legacy is usually expressed in the form of a request or direction to the trustees or executors of the will to pay or make over the subject of the legacy to the legatee. When constituted by codicil or separate writing, legacies are frequently expressed in terms of direct bequest. They may also be constituted by disposition; the *de præsenti* mode of conveyance being, by the law of Scotland, a universal form of transmission. Indeed, such is

the favour shown to last wills, that the mere expression of the testator's wish, without the nomination of an executor or trustee, and without even the form of a disposition or grant to any one, is held to operate a transference of the subject of bequest to the uses of the will.

Nuncupative legacies: to what extent effectual.

1033. A verbal or nuncupative legacy is effectual only to the extent of £100 Scots;[1] and a plurality of legacies, each of the value of that sum, may be bequeathed by the same person. The rule is to be received subject to the following qualifications:—*First*, A bequest of larger amount may, as already explained, be made by delivery of the subject to the grantee *intuitu mortis*. *Secondly*, A nuncupative legacy for a larger sum than £100 Scots is effectual to the extent of £100 Scots.[2] *Thirdly*, A verbal direction *to an executor and residuary legatee* to pay a legacy of any amount is effectual as a trust; but such trust can only be proved by his writ or oath.[3] But, *fourthly*, it is incompetent to require the oath on reference of a mere *trustee*, for the purpose of proving a verbal legacy beyond the specified amount.[4]

Deposits in savings banks.

1034. The provisions of the Act 59 Geo. III., cap. 62, section 7, by which testamentary papers signed by mark are made effectual to convey deposits in savings banks not exceeding £20, seem to be repealed by 5 and 6 Will. IV., cap. 57, section 2.

1035. Under this division of the subject we might conveniently consider questions as to the capacity of the testator and the legatee, the identification of the subjects and objects of the gift, &c. These subjects are fully discussed in other chapters specially relating to these branches of the law.

Legacies distinguished according to different principles of classification.

1036. The legal character of the legatee's interest may be considered in relation—(1) to the quality of the legacy, whether heritable or moveable; (2) in relation to the duration of his interest, whether fee, liferent, or reversion; (3) in relation to the subject of the interest, whether a right to a specific thing, or to a sum of money payable out of the estate; and (4) in relation to the limited or unlimited character of the interest, whether a legacy of quantity or a residuary interest.

Legacy, whether heritable or moveable.

1037. First, as to the quality of the legacy. The subject bequeathed, or the fund out of which the legacy is payable, is either heritable or moveable; and on this distinction depends the succes-

[1] See Ersk. 3, 9, 7, who refers the rule to the general principle of the law of Scotland, that no obligation for a sum exceeding £100 Scots may be proved by witnesses. Bell's Prin. § 1868, 5th ed. § 1869, 1874.

[2] Ersk. 3, 9, 7; *Forsyth's Trs.* v. *M'Lean*, 18 Jan. 1854, 16 D. 343; *Kelly* v. *Kelly*, 8 March 1861, 23 D. 703.

[3] Erskine and Bell, *supra*; *Hannah* v. *Guthrie*, 1738, M. 3837; 5 Br. Sup. 203; Elch. "Legacy," No. 5.

[4] *Forsyth's Trs.* v. *M'Lean*, *supra*.

CHAPTER XXXI.

Legacy of heritage.

sion of the legatee in the event of his dying before receiving payment. The expression "legacy of heritage" is usually employed in a restricted sense, as denoting a legacy constituted by way of burden upon the estate conveyed to an heir; such burdens being effectual against disponees, on the principle of passive representation.[1] The right of the legatee is sufficiently protected against the voluntary disposition or bankruptcy of the disponee if the legacy is in the *dispositive clause* of the will or general disposition declared to be a real burden on the lands, because the disponee can neither adjudge in implement nor expede a notarial instrument, so as to be able to give a valid feudal title to a purchaser without inserting the qualification that the estate is held subject to the real burden of the legacy.[2] Again, if the disponee should propose to convey his personal right under the will, or should suffer bankruptcy, in either case the right of the person taking from him would be only such as he had to give. The right of the legatee is not affected by the lapse of the gift to the heir on which it is charged.[3]

Bequests of heritable estate under trust-settlements.

1038. Heritable estate may be made the subject of bequest under a trust-disposition and settlement disposing of the general estate. A very large proportion of the decided cases on legacies have arisen under conveyances to trustees, embracing heritable as well as moveable estate. When *de præsenti* language was required in the case of a will disposing of heritage, it was considered that a trust-disposition of heritable estate had the effect of investing the truster with a power of testing upon the property;[4] the exercise

[1] *Dundas* v. *Dundas*, 22 Dec. 1830, 4 W. & S. 460; *Storey* v. *Paxton*, 1878, 6 R. 293.

[2] *Cowie* v. *Muirden*, June 20, 1893, App. Ca. p. 674, reversing 18 R. 706, and overruling opinion of Lord Pr. Inglis in *Williamson* v. *Begg*, 1887, 14 R. 720, to the effect that the provision in Sch. L of the Titles Act, 1868, as to the insertion of real burdens, is only applicable where the disposition in the will is specific as well as general.

[3] *Wyllie* v. *Ross*, 1825, 4 S. 172, N.E. 174 (2 W. & S. 576); but see *Moncrieff* v. *Skene*, June 29, 1825, 1 W. & S. 672 (2d point); *Oke* v. *Heath*, 1 Ves. 135. The donee of a power of appointment appointed a part of the fund to A., subject to an annuity to A.'s mother, and gave the residue of the fund to B. A. predeceased the granter, yet his mother was held entitled to her annuity out of the fund, the *whole* of which (*minus* the annuity) devolved, under the appointment, to B.

[4] Per Lord Curriehill in *Mackilligan* v. *Mackilligan*, 18 D. 87. In *Brack* v. *Hogg*, 25 Feb. 1831, 5 W. & S. 61, the point was raised very purely. The testator having executed a trust-disposition of his heritable estate in conformity with the requirements of the law of Scotland, containing a direction to the trustee to convey "to such person or persons as I shall specify and name in my will, or by any separate letter or writing to that effect," thereafter executed in Jamaica a later will and testament disposing of the residue in these terms: "I give and bequeath to my nephew, Adam Hogg, the residue and remainder of my property, real, personal, and mixed, consisting of lands, houses, &c. in Berwickshire, Great Britain. In affirming the judgment of the Court of Session, sustaining the bequest, Lord Lyndhurst observed:—"The

of this power being liable, however, to be defeated by the operation of the law of deathbed then existing. Under the present law there is no practical distinction between a legacy payable out of heritage and any other special or demonstrative legacy.[1]

Legacy, whether of the capital, interest, or reversion.

1039. Secondly, in relation to the duration of the legatee's interest, the subject of a legacy may be either—(1) the capital or fee of a sum of money or specific subject; (2) a liferent interest in or terminable annuity out of it; or (3) a reversionary interest in the capital. When a legacy or estate is given simply, without limitation as to time, it is, of course, presumed to be an estate in fee. The interest of the beneficiary accordingly will not be cut down to a liferent by reason of the use of expressions capable of being construed as substitutions.[2] As a general rule, express words are required to limit an estate to a life interest.[3] Questions between liferenters and fiars, as to the right to interest and accessions, burdens and abatements, are dealt with in the ensuing sections of this chapter.

Legacies distinguished as general, specific, or demonstrative.

1040. Next, as to the subject or legal character of the interest taken by the legatee. According to this principle of division three classes of legacies are distinguishable—general, demonstrative, and specific. A general legacy—*legatum quantitatis*—is a legacy not of a special article or debt, but of a certain quantity or value which may be measured either in money (as is usual) or in goods of a specified description.[4] A specific legacy is a gift of a specified subject, which may either be corporeal or incorporeal; a definition which includes sums of money invested on specific securities.[5] A demonstrative legacy is a gift of a sum of money payable out of or

will was intended by the party to be an execution of the power contained in the first deed. It is impossible to consider the nature of the transaction itself, as mentioned in the first deed, and the description of the property, and not to come to the conclusion that the party intended to execute that power. The question that remains then is, whether the mode of execution was sufficient." And on the authority of the case of *Willoch* v. *Auchterlony*, 1769, M. 5539, his Lordship was of opinion that it was sufficient; 5 W. & S. 69. See Bell's Pr. § 1863, and cases there cited; also Chapter II., Section II. (International Law).

[1] See Chapter XXXII., Section II., as to gifts given by way of burden on a heritable estate.

[2] *Alexander* v. *Alexander*, 13 Dec. 1843, 12 D. 345; *O'Reilly* v. *Sempill*, 15 D. 789, 2 Macq. 288.

[3] See *Campbell* v. *Campbell*, 30 May 1843, 5 D. 1083; 3 Dec. 1852, 15 D. 173; *Findlay* v. *Macintyre*, 11 Dec. 1849, 12 D. 325; *Massy* v. *Scott's Trs.*, 18 2, 11 Macph. 173.

[4] Ersk. 3, 9, 11, and 12; Bell's Pr. § 1873-6. By means of a trust, general legacies may be made to comprehend certain of the qualities of specific legacies. For example, if a testator direct his trustees immediately after his death to invest a sum in the funds for the use of a general legatee, and the trustees are unable from any cause to make the investment until some time after, they must nevertheless purchase a quantity of stock equal to what they could have bought with the legacy at the proper time; *Horsbrugh* v. *Horsbrugh*, 1 March 1848, 10 D. 824.

[5] Ersk. *supra*; Bell's Pr. § 1874-7.

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charged upon a particular subject or security; it is similar in its legal properties to a legacy of quantity. This variety of the general legacy appears to have escaped the attention of our institutional writers, though it is recognised under this designation in English decisions and in the Civil Law.[1] Examples will be found in the reported cases on legacies.[2] In the case of *Bell*, cited below, a *mortis causa* trust provided for the payment of a certain annuity, the testator being bound to pay such sum as might be necessary to secure it. Previous to his death the testator put certain sums of money into the hands of his trustee, and directed the annuity to be paid *from the interest of those sums*. The Court held that the object of the special direction was merely to secure the annuities; that the bequest was not specific, and that the general estate remained bound for the payment of the annuity. In the case of *Douglas' Executors*,[3] the question of specific or demonstrative was raised with reference to legacies to the testator's children, which were made payable out of arrears of income due to the testator by his father's trust-estate. The words used were of the form, "I leave and bequeath to my daughter A. the sum of . . . to be paid out of arrears of income due from the Monteath trust-estate." The arrears recovered were insufficient to pay the legacies given out of the specific fund; there was, however, an available surplus of residue. The Court, by a majority (Lord Neaves dissenting), accepted the argument that this was not the case of a gift of a specific fund, but rather an indication of a source from which money might be found for payment, and the legatees were held to have a claim against the residuary estate. Lord Neaves' dissent was founded on the circumstance that this was a charge on a fund of uncertain amount, and that the legacies were contingent on a sufficiency of funds being recovered from the Monteath trust-estate.

Direction to purchase is equivalent to a general legacy.

1041. A direction to purchase a certain subject, or to invest money in specified securities for a particular object,[4] is not a specific legacy, but is of the nature of a demonstrative legacy. Accordingly, it was held that legacies of quantity were preferable to the interest of a residuary legatee under a direction to apply the residue of the testator's fund in the purchase of an heritable estate.[5]

[1] 2 Wh. & T. L. Ca. 6th ed. 253; Voet ad Pand. 35, 1, 5.

[2] *Melvin* v. *Nicol*, 1824, 3 Sh. 31, N.E. 21; *Bell* v. *Brodie*, 1847, 9 D. 712; *Hagart* v. *Hagart*, 1834, 13 S. 35.

[3] Sp. Ca. *Douglas' Exrs.*, 1869, 7 Macph. 504.

[4] *Dewar* v. *Kirk-Session of Torryburn*, 23 March 1864, 2 Macph. 910.

[5] *Hamilton* v. *Bennet*, 16 Aug. 1833, 6 W. & S. 533, affirming 10 Sh. 230; *Train* v. *Bell's Trs.* 26 May 1824, 3 Sh. 68, N.E. 44. On the construction of trusts for the purchase of heritable estate, see Chapter LVI.

Specific legacies, how distinguished from general.

1042. Specific legacies are further distinguished from legacies of quantity or general legacies by the nature of the rights conferred upon the legatees. *First*, A specific legacy has the effect of an assignation *mortis causa* to the subject; a general legacy confers only a *jus crediti*.[1] *Secondly*, Specific legacies are preferable to general bequests and shares of residue. The debts of the estate are a burden primarily affecting the latter;[2] and although the right of the special legatee will necessarily yield to that of the testator's creditors, it has been held that creditors attaching a specific legacy must assign their debts to the special legatee.[3] A legacy for mournings seems to be preferable to other general legacies.[4] In virtue of his real right, the special legatee may, with concurrence of the executor, bring an action for recovery of the subject against the party in possession.[5] *Thirdly*, From the nature of the special legatee's interest, it follows that his right under the testament is extinguished if the subject perish before it is delivered to him, for *res perit suo domino*.[6] The appropriation of the subject to other purposes in the testator's lifetime, *e.g.*, uplifting the sum contained in a bond or other security, operates as an implied revocation or ademption of the bequest of the specific subject,[7] and this, according to the present state of the law, irrespective of the testator's intention to adeem.

Ademption of specific legacies by sale or conversion of the subject.

Legatum liberationis.

1043. In the category of specific bequests may be included the *legatum liberationis*, or legacy to the testator's debtor of the value of his debt. With reference to this description of bequest, it has been decided that a legacy to certain debtors, in the form of "a free discharge of everything they may owe me at my death," does not comprehend bills coming into the hands of the legatee on account of the testator, these being regarded not as debts, but as in the nature of a deposit or trust.[8] A legacy in this form, "I give the money I lent my nephew to his mother at my death," was held to carry arrears of interest, which had not been demanded from the debtor, on the assumption that there was a contract to

[1] Bell's Pr. §§ 1875-7.

[2] Ersk. 3, 9, 12, citing *Monro* v. *Scott's Exrs.*, 1630, M. 8048; *Blair* v. *Tytler*, 11 March 1865, 3 Macph. 698.

[3] *Balmerino* v. *Balmerino's Crs.*, 1746, M. 8074.

[4] *Caldwall* v. *Caldwall*, 1736, M. 8066.

[5] Ersk. *supra*. See *Gray* v. *Cockburn*, 1711, M. 8062; *Forrester* v. *Clerk*, 1627, M. 2194.

[6] *Wauchope* v. *Wilson*, 1724, M. 8063.

[7] *Pagan* v. *Pagan*, 26 Jan. 1838, 16 Sh. 383, and cases there cited; *Jack* v. *Lauder*, 1742, M. 11,357; *Presbytery of Kirkcudbright* v. *Blair*, 1742, Elch. "Legacy," No. 10; M. 8066; *Panton* v. *Gillies*, 22 Jan. 1824, 2 Sh. 632, N.E. 536; and see Section III., *infra*, as to interest and accessions, and the extent to which special legacies may be affected by the claims of creditors and annuitants. We refer to Chapter XXI., Section III. (Revocation by Ademption), for a statement of the English and Scottish authorities on the ademption of legacies.

[8] *Graham* v. *Denniston*, 1792, M. 8108; Bell's Oct. Ca. 302; *Dougall* v. *Dougall*, 1789, M. 15,949.

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pay interest.[1] A simple legacy to a debtor is held to be compensated by the debt, upon proof that the debt is resting-owing.[2] A benefit may also be conferred on the testator's debtor, by directing that an existing loan may be continued for a definite term of years. Such directions are of frequent occurrence in family settlements, and are liberally interpreted in favour of the debtor.[3] As regards legacies to the *creditors* of the testator, the presumption of the law of Scotland is rather adverse to donation. The subject of the satisfaction of debts by legacies is reserved for discussion in a subsequent chapter.[4]

Legacies to creditors.

Legatum rei alienæ.

1044. *Legatum rei alienæ* is a bequest of a subject not belonging to the testator. The rule of construction, derived from the Roman Law,[5] is, that if, on the one hand, the testator erroneously supposed the thing bequeathed to be his property,[6] or erroneously believed the subject to be moveable and within the power of his executor,[7] the legacy is ineffectual; but if, on the other hand, he knew that it was not his own, the legacy is effectual on the principle that the testator intended that his executor should purchase the subject.[8] The cases in which bequests of subjects not disposable by will have been held binding upon the heir are in some respects analogous to the case of the *res aliena scienter legata*.[9]

What terms import a demonstrative as distinguished from a specific legacy.

1045. A considerable mass of decisions has been accumulated in the jurisprudence of England on the question, what words imply a specific as distinguished from a demonstrative legacy. The cases have relation chiefly to legacies of money in particular places, legacies of debts, legacies of stock, and legacies connected with realty. While illustrating the principles upon which legacies of these descriptions are distinguished, they add little or nothing to our means of applying the principles in practice. In most of the cases the character of the bequest is ascertained by inspection; few of them present any serious difficulty.[10] The subject of specific legacies would be incomplete if it did not include a statement of the import of the decisions on the construction and meaning of terms descriptive of subjects of specific bequest. But this part

Import of general terms descriptive of the subject of bequest.

[1] *Cuninghame* v. *Vassall*, 1871, 10 Macph. 49.

[2] See *Reid* v. *Hope's Trs.*, 6 May 1825, 1 W. & S. 172.

[3] *Alexander* v. *Lowson's Trs.*, 1890, 17 R. 571.

[4] Chapter XLI., Section III.

[5] Inst. lib. 2, tit. 20, § 4.

[6] Ersk. 3, 9, 10; Bell's Pr. §§ 1882-4.

[7] Ersk. *supra*; *Wardlaw* v. *Fraser*, 1663, M. 5703.

[8] *Falconer* v. *Dougal*, 1664, M. 13,301.

[9] *Catto* v. *Gordon*, 1748, M. 8077; *Cranston* v. *Brown*, 1674, M. 8059; *Kinloch* v. *Lundie*, 1663, M. 8052; *Drummond* v. *Drummond*, 1624, M. 2261. This subject is also noticed under the head of Legacy of Heritage. See *Dundas* v. *Dundas*, 22 Dec. 1830, 4 W. & S. 460, affirming 7 Sh. 241; *Redford* v. *Redford*, 5 Dec. 1816, Hume, 884.

[10] An epitome of the cases will be found in 2 Wh. & T. L. Ca., 6th ed. 253 *et seq.*

of the subject has already been considered in the chapter treating of descriptive words applicable to the subject of a gift or bequest, and, to avoid repetition, reference is made to that chapter.[1]

Legacies definite in amount, or in shares of residue.

1046. Another classification of legacies, according to the interest of the legatee, is that by which they are divided into legacies definite in amount, and legacies embracing the whole or an aliquot part of the free succession. The former are those which we have had chiefly in view in the preceding observations; the latter are termed residuary bequests, or universal legacies. The interest of a residuary legatee is distinguished by some important properties from that of a general or special legatee. The subject of bequests of residue is considered in a subsequent section.

Division of a residue amongst general legatees in proportion to their legacies.

1047. The same persons to whom legacies of quantity are given may also be made the recipients of the testator's residuary estate; as when a testator bequeaths legacies to certain parties, and directs that the residue of his estate shall be divided amongst those parties, either equally or in proportion to the value of their respective legacies. In a case of this kind, where a testatrix, after leaving a variety of legacies of unequal value, directed the residue of her funds to be divided "between and among the whole legatees whose legacies exceeded £100," but that, in the event of her funds being insufficient for payment of the foresaid legacies, each of them which exceeds £100 sterling should suffer proportional abatement," it was held that the residue ought to be equally divided; for, as there was no direction to make a division in the proportion of the values of the legacies, the presumption of equality of interests was applicable to the case.[2]

SECTION II.

Annuities. (How chargeable: When susceptible of being Capitalised.)

Annuity, out of what subjects payable.

1048. There are not many points in the law of legacies peculiar to legacies given by way of annuity, and such questions as arise are very satisfactorily settled by decisions.

1049. *First.* As to the incidence of an annuity: this being an annual charge, it affects the income of the estate, and provided there be a sufficiency of income to meet the claim, the liferenter of the income of residue must bear the burden without having any claim of constitution against the fiar or beneficiary of capital.[3] But where

[1] Chapter XVIII., Section II.

[2] *Pitcairn* v. *Thomson*, 8 June 1853, 15 D. 741.

[3] *Currie* v. *Threshie*, 1846, 8 D. 1021; and see *Nixon* v. *Borthwick*, 1806, M. "Liferenter," App. No. 2.

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a testator directs the purchase of an annuity, it would seem that this is a burden on the capital of the residuary estate, because the legatee (as after mentioned) is entitled to claim payment of the capital sum.[1] Moreover, as an annuity is held to be in a certain sense a heritable right, it is held that in the administration of the succession of a landed proprietor whose heritable estate is disposed of separately from the moveable estate, an annuity which is not given with reference to any particular source of payment is chargeable against the estate of the heir.[2] But in the more ordinary case of a trust-settlement of mixed heritable and moveable estate this distinction does not arise, and annuities are payable as legacies out of the income of the estate as a whole.

Annuity, when chargeable against the capital.

1050. *Secondly.* There is a series of cases determining that annuities, like all other legacies, are preferable to residue, and are payable out of the capital of the estate in the case of the income being insufficient to meet the claims, or inapplicable.[3] But all such rules of course are liable to be displaced by declared intention; hence there may be preferences as between annuitants,[4] and there are cases where a general liferenter may even be preferable to an annuitant.[5] In relation to legacies by way of annuity the ordinary rules as to *falsa demonstratio*, double legacies, and satisfaction, which are considered elsewhere, apply.[6]

Annuitant may elect to take the capitalised value.

1051. *Thirdly.* When an annuity is given unconditionally, it is always in the power of the annuitant to sell his annuity for its capitalised value. On this ground the rule has been established, that where a testator directs the purchase of an annuity, and even where the *jus mariti* is excluded, the annuitant has the right of electing to take the value of the annuity in money.[7] In one of the last cases on the subject, Lord Moncreiff observed that he hoped it would be clearly understood that the case was decided on the general principle "that an act which, if done, can be at once undone by the person having interest, will not be directed by the Court to be done."[8] On this principle it was held that a power

[1] See *Wilson* v. *Beveridge*, 11 Sh. 343.

[2] *Breadalbane's Trs.* v. *Jamieson*, 1873, 11 Macph. 912.

[3] *Knox's Trs.* v. *Knox*, 1869, 7 Macph. 873, founding on Williams on Executors, and cases there cited; *Kinmond's Trs.* v. *Kinmond*, 1873, 11 Macph. 381; *Adamson* v. *Adamson*, *infra*.

[4] *Adamson's Trs.* v. *Adamson's Exrs.*, 1891, 18 R. 1133.

[5] *Hutcheson's Trs.* v. *Hutcheson*, 1886, 13 R. 915.

[6] See, for example, *Forbes' Trs.* v. *Forbes*, 1893, 20 R. 248.

[7] *Kippen* v. *Kippen's Trs.*, 1871, 10 Macph. 134; *Dow* v. *Kilgour's Trs.*, 1877, 4 R. 403, and the series of cases there cited. See also *Lawson's Trs.* v. *Lawson*, 1890, 17 R. 1167, where the trustees had the option of paying the income of a share of residue, or purchasing an annuity, and the legatee was held entitled to payment of the capital.

[8] 4 R. 405.

of appointment was validly exercised by giving, as the share of a child, a sum to be expended in the purchase of an annuity.[1]

1052. If the annuity be declared alimentary, the trust cannot be discharged by arrangement between the annuitant and the trustees or representatives of the truster. The subject of alimentary rights, which includes alimentary liferents as well as annuities, is considered in the next chapter.[2]

SECTION III.

Rights of Legatees: Interest Payable on Legacies.

1053. The points to be considered have relation to the extent of the legatee's interest, on the assumption that there are sufficient funds for all the purposes of the will. The abatement of legacies in the case of a deficiency of free funds is separately considered.

Legacy increased by interest or accession.

1054. I. Extent of the Legatee's Interest.—The interest of the legatee, as appearing upon the face of the will, is, on the one hand, enhanced by accessions to the subject and by accruing interest, and, on the other, is diminished by burdens, debts, and legal deductions.

Legacy of quantity not susceptible of increase by accession.

1055. A legacy of quantity, whether general or demonstrative, does not seem to be susceptible of being increased by accession; for it is an established rule that all accessions to the general estate, whether within the contemplation of the testator or not, fall into the residue. On this principle it is held, that where a debt is secured by a policy of assurance which only becomes available at the testator's death, the benefit of a bonus upon the policy accrues to the general estate, notwithstanding that the assurance may have been intended as an equivalent for the debt.[3] Special legatees are in a different position; and it is a reasonable conclusion that, as their rights are confined to the specific subjects of bequest, they are also susceptible of being enlarged by accessions to those subjects.[4] Legacies are often given free of legacy duty,—a direction which does not generally give rise to any question.[5] A direction that legacies and annuities shall be paid free of all burdens and deductions does not include income tax, and it is still an unsettled

Specific legacy carries right to accessions.

[1] Sp. Ca. *Moir's Trs.*, 1871, 9 Macph. 848.

[2] Chapter XVI., Section V.

[3] *Marquis of Queensberry* v. *Scottish Union Insurance Co.*, 1 Bell, 183, affirming 1 D. 1203; *Shand* v. *Blaikie*, 31 May 1859, 21 D. 878.

[4] *Roberts* v. *Edwards*, 33 L.J. Ch. 369; specific legacy to testator's wife of "the £2000 secured on his life;" she was held entitled to bonuses due at the time of death.

[5] *Kirkpatrick* v. *Bedford* (*Sharpe's Tr.*), 1878, 6 R. (H.L.) 4; Sp. Ca. *M'Alpine*, 1883, 10 R. 837.

point whether a testamentary direction to pay an annuity free of income tax is valid.[1]

Accession belongs to fiar, and liferenter has only the interest of it.

1056. A liferenter of shares of stock is not entitled to the benefit of an extraordinary dividend or bonus, but only to the life interest of it.[2] On the other hand, a legatee of the fee of stock, burdened with a substitution, was found to be entitled to the benefit of a bonus.[3] If trustees are directed to hold stock for the benefit of a liferenter, and with a power of changing the securities, the right of the liferenter to the current dividend is not prejudiced by a conversion in the exercise of the power. Accordingly, where trustees received a sum of £10 per share "in lieu of dividend," over and above the price of £140 per share, and a slump sum for certain other stock, the liferenter was found to be entitled to a proportion of the sum of £10 per share corresponding to the period during which the trustees had held the first-mentioned stock, and to a like proportion of the dividend declared upon the second portion.[4] Where stock in trade, furniture, or other corporeal moveables, are given to a person in liferent, it is an implied condition that the liferenter shall keep up the stock, and leave it substantially of the value and description which he receives.[5] Where a truster directed his estates to be conveyed over in terms of a certain destination at the period of one year after the current year in which his death should take place, and appointed the free rents accruing prior to that event to be applied in payment of debts, and the yearly rents thereafter to be paid to his daughter, it was held that the words "current year" meant the civil and not the agricultural year.[6]

Apportionment Act not applicable to bequests of termly payments.

1057. The Apportionment Act (4 and 5 Will. IV., c. 22) does not apply to testamentary bequests of the rents current during the year of the testator's death; and accordingly, where a testator directed the whole free rents of a specific heritable subject to be paid to his widow during her life, commencing at the first term of Whitsunday or Martinmas after his death, she was held entitled to payment at the first term after her husband's death of a full half-year's rent in addition to the usual aliment and mournings.[7] And where a

[1] *Rodger's Trs.* v. *Rodger*, 1875, 2 R. 294; *Kinloch's Trs.* v. *Kinloch*, 1880, 7 R. 596.

[2] *Rollo* v. *Irving*, 27 July 1803, 4 Paton, 521, reversing M. "Liferenter," App. No. 1. See *Cochrane* v. *Black*, 1 Feb. 1855, 17 D. 321, on the question whether the profits over and above interest at 5 per cent. of trust money, which had been employed in trade, belonged to the liferenters or to the fiars under the trust.

[3] *Cumming* v. *Cumming's Trs.*, 26 Feb. 1824, 2 Sh. 743, N.E. 620.

[4] *Donaldson* v. *Donaldson's Trs.*, 12 Dec. 1851, 14 D. 165.

[5] *Rogers* v. *Scott*, 19 July 1867, 5 Macph. 1078.

[6] *Williamson* v. *Hay*, 19 June 1855, 17 D. 960.

[7] *Thomson* v. *Douglas*, 15 July 1856, 18 D. 1240; see *Trotter* v. *Cunninghame*, 25 Nov. 1839, 2 D. 140; *Lockhart* v. *Lockhart*, 1 Feb. 1839, 1 D. 443.

testator directed his trustees to pay to his sister the dividends or interests payable on £500 of certain bank stock, the principal sum being given to other persons, the legatee of income was found to be entitled to dividends which, although declared prior to the testator's death, were not payable until after that event.[1]

In what cases a legacy of interest will carry the capital.

1058. A legacy of the interest of a fund may, if such appear to be the intention of the testator, be legitimately construed as a bequest of the subject itself; the failure to appropriate the capital being held, in the absence of any distinct indication of intention, to create a presumption that an interest in perpetuity was intended to be given.[2]

From what period interest may be claimed by the legatee.

1059. With respect to interest on legacies, the old rule was that interest was payable, at all events, from the period of twelve months after the testator's death.[3] By modern practice, interest is held to be due from the date of the testator's death, or from the period at which the funds become productive.[4] In the case of *Ogilvie's Legatees* v. *Hamilton*,[5] interest was allowed upon certain demonstrative legacies only from the first term after the elapse of three years from the testator's death, on the ground that the legacies were specially declared not to be payable until after the sale of estate upon which they were secured, and that three years was a reasonable time to allow for the execution of a power of sale. This case is not to be regarded as a precedent, and it has since been ruled that, in the absence of any express direction as to time, the right to the beneficial enjoyment emerges on the completion of the first year after the testator's death.[6]

[1] *M'Eachern* v. *Campbell's Trs.*, 26 May 1865, 3 Macph. 833. In the English case of *De Gendre* v. *Kent*, Law Rep. 4 Eq. Ca. 283, dividends declared before, but payable after the testator's death, were, on the contrary, held to form part of the *corpus* of the residuary estate, and not to pass under a bequest of the income.

[2] Compare *Sanderson's Exrs.* v. *Kerr*, 21 Dec. 1860, 23 D. 227, with *Burnsides* v. *Smith*, 10 June 1829, 7 Sh. 735. See Chapter XIX., Section III., where the cases are referred to.

[3] *M'Innes* v. *M'Allister*, 29 June 1827, 5 Sh. 862, N.E. 801; affirmed on another point,—*Stevenson* v. *Macintyre*, 20 June 1826, 4 Sh. 776, N.E. 784. On the other hand, the legatee is chargeable with 5 per cent. interest and accumulations on advances made to him beyond the value of his share; *Plaine* v. *Thomson*, 3 Dec. 1836, 15 Sh. 194.

[4] *Duff's Trs.* v. *Scripture Readers*, 19 Feb. 1862, 24 D. 552.

[5] *Ogilvie's Legatees* v. *Hamilton*, 10 Dec. 1833, 12 Sh. 189.

[6] See the cases upon directions to purchase and entail lands in Chapter LVI., Section II. According to English practice, if a testator has fixed no time for the payment of general legacies, they are held to be payable twelve months after his decease, and to carry interest from that date,—*Collyer* v. *Ashburner*, 2 De G. & Sm. 404; *Wood* v. *Penoyre*, 13 Ves. 333; and it is immaterial that the estate is not productive,—*Pearson* v. *Pearson*, 1 S. & L. 10. But there are several exceptions to this rule:—

1. If a legacy is found to be in satisfaction of a debt, interest is of course due from the testator's death upon the amount of the debt as at that date: *Clarke* v. *Sewell*, 3 Atk. 99.

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Interest derived from specific legacies.

1060. On the principle that the gift of an income-bearing subject gives right to the annual proceeds, the interest or dividend derived from the subject of a specific legacy from the time of the testator's death belongs to the special legatee, and this right arises even when there is a postponed period of payment or delivery of the stock or subject, provided that the right to the subject vests at the testator's death.[1] In one of the older cases, accumulated interest was allowed to the legatees of a specific fund, it being considered that they were entitled, equally with the legatees of the residue, to the actual produce of the subjects specially bequeathed.[2] Dividends declared before the testator's death, but payable at a subsequent period, have been held to belong to the legatee of the specific subject.[3]

Appropriation of interest where distribution of capital postponed during minorities.

1061. One of the most difficult questions having relation to this subject is that of the application of interest in cases where the payment of legacies or provisions is conventionally postponed, and no direction is given regarding the appropriation of the intermediate proceeds. In the case of a legacy given to children by their father, or by a person standing *in loco parentis*, which is declared to be payable at majority or marriage, the object of the postponement is presumed to be the protection of the estate; interest is accordingly due on the legacy *a morte testatoris*,[4] and may be applied in so far as

2. Where a testator directs a legacy to be paid before the expiration of the period of twelve months from his death, interest will be due from the period of payment; *Lord Londesborough* v. *Somerville*, 19 Beav. 295. And if a testator direct the legacies to be invested for the benefit of the legatees at a period beyond the expiration of twelve months from his death, interest will nevertheless be due from the end of the first year after his death, unless the contrary is expressly directed; *Varley* v. *Winn*, 2 K. & J. 700.

3. Interest is due upon a legacy by a father to his legitimate child *a morte testatoris* (*Beckford* v. *Tobin*, 1 Ves. sen. 310), unless the father has already made a competent provision for the child; *re Rouse's* estate, 9 Hare, 649; *Donovan* v. *Needham*, 9 Beav. 154. The rule has been extended to provisions made by a person putting himself *in loco parentis*; *Wilson v. Maddison*, 2 Y. & C. Ch. Ca. 372.

4. Annuities are held to run from the date of the testator's death, and the first payments fall to be made one year thereafter; *Gibson* v. *Bott*, 7 Ves. 96. And a legatee of the life interest in a residue of personalty is entitled to the proceeds from the testator's death. See the cases cited 2 Wh. & T. L. Ca. 6th ed. 311.

5. Where a legacy is made payable at a particular time, or on the attainment of a certain age, it does not carry interest until that time; *Tyrell* v. *Tyrell*, 4 Ves. 1,—unless the bequest comes from a parent, or a person *in loco parentis*; in which case interest will be allowed from the death of the testator, if necessary for maintenance; 2 Wh. & T. L. Ca., *ut supra*.

[1] *Glasgow's Trs.* v. *Glasgow*, 30 Nov. 1830, 9 Sh. 87.

[2] *M'Allister's Trs.* v. *M'Allister*, 30 Nov. 1836, 15 Sh. 170; see p. 159. In England specific legatees are held entitled to dividends and interest from the time of the testator's death, although the legacies may have been directed to be paid within twelve months after the testator's decease; *Bristow* v. *Bristow*, 5 Beav. 289; 2 Roper on Legacies, 4th ed. 1250.

[3] *Paterson* v. *Macnaughton*, 14 Dec. 1838, 1 D. 241.

[4] *Gillespie* v. *Marshall*, 1802, M. "Accessorium," App. No. 2.

is necessary to the maintenance of the children.[1] Even where the vesting of the capital is rendered uncertain by the payment being made contingent on an uncertain event, the right to the intermediate profits has, in the absence of an express direction to accumulate, been held to vest at each term, and to be transmissible to representatives.[2] A destination of lands in trust for behoof of an heir *in posse* was held to carry with it the right to the intermediate rents of the lands in favour of such heir when he should come into existence.[3]

Children presumed to take a vested interest in the proceeds.

1062. In cases of postponed distribution, it would rather seem that, unless the testator's purpose in directing his trustees to retain the capital is the benefit of the legatee himself (as in cases of minority or insanity), the interest must be accumulated so that it shall eventually fall into residue. This principle will be found to be the ground of decision in two well-considered cases,[4] where the contention that undisposed-of interest should fall to heirs or next of kin was rejected. The subsistence of a liferent interest affecting an estate out of which a legacy is payable, obviously cuts off the claim of the special legatee to interest during the currency of the liferent, unless the legacy is expressly declared to be payable with interest.[5]

In other cases of postponed distribution, unappropriated interest falls into residue.

1063. As to the rate of interest payable upon legacies, the rule of practice is, that no higher rate can be claimed than the fund has actually yielded,[6] unless the executor has unjustly refused payment, in which case the claimant is entitled to legal interest from the commencement of the proceedings.[7] Some doubt was supposed to be thrown on the rule as here stated by the decision of the House of Lords in *Kirkpatrick* v. *Sharp's Trustee*;[8] but in the case of

At what rate interest is payable on legacies.

[1] *Campbell* v. *Reid*, 12 June 1840, 2 D. 1084; *Ogilvie* v. *Cumming*, *infra*; *Wilson* v. *Niblie*, 13 Jan. 1825, 3 Sh. 430, N.E. 301.

[2] *Ogilvie* v. *Cumming*, 27 Jan. 1852, 14 D. 363; *Hardman* v. *Guthrie*, 1 June 1828, 6 Sh. 920. But see *Smith's Trs.* v. *Ferguson*, 4 Dec. 1867, 6 Macph. 83.

[3] *Templer* v. *Templer*, 1 April 1828, 3 W. & S. 47, affirming 4 Sh. 460.

[4] *Pursell* v. *Elder*, 19 D. 71, 3 Macph. (H.L.) 59, 4 Macq. 992; *Sturgis* v. *Campbell*, 23 D. 1128, 3 Macph. (H.L.) 70.

[5] *Grant* v. *Leith*, 31 Jan. 1811, F.C. See observations on this subject in Section V. (Residuary Interests).

[6] See *M'Innes* v. *M'Allister*, 29 June 1827, 5 Sh. 862, N.E. 801, where 4 per cent. was allowed on legacies from the period of one year after the testator's death; *Williamson* v. *Suttie*, 20 July 1843, 15 Jur. 637, where bank interest only was found to be due from the date of consignation in a process of competition in which the holder of the fund did not take an active part; *Menzies* v. *Livingston*, *infra*, and more recently, *Inglis' Trs.* v. *Breen*, 1891, 18 R. 487; *Baird's Trs.* v. *Duncanson*, 1892, 19 R. 1045.

[7] See *Darling* v. *Adamson*, 16 May 1834, 12 Sh. 598; *Kelly* v. *Kelly*, 8 Mar. 1861, 23 D. 703; *Duff's Trs.* v. *Scripture Readers*, 19 Feb. 1862, 24 D. 552. The rate of interest allowed by the Court of Chancery is 4 per cent.; *Sitwell* v. *Bernard*, 6 Ves. 543, and cases cited 2 Wh. & T., 3d ed. p. 287.

[8] *Kirkpatrick* v. *Bedford* (*Sharpe's Tr.*), 1878, 6 R. (H.L.) 4.

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Inglis' Trustees v. *Breen*, noted above, it was pointed out by the writer, in whose opinion the Lord President concurred, that the ruling of Lord Cairns in *Kirkpatrick's* case proceeded solely on the admission of English counsel that the law of Scotland allowed interest on legacies at five per cent. It may therefore be taken that where trustees are not *in mora* the actual produce or increase of the estate is to be shared by the general and residuary legatees according to their respective interests. Under the old law of moveable succession a claim for the wife's share of the goods in communion was treated as a claim of debt which carried interest at five per cent.;[1] but children were held not to be entitled to interest until forisfamiliation, or until such time as they were presumed to have compensated by their services the money expended on their clothing and maintenance.[2]

Compound and penal interest.

1064. Compound interest is not due on legacies in the ordinary case, and where a person bound himself in his daughter's marriage-contract to give to certain trustees for a provision the sum of £300, "the interest of which sum is to accumulate with the principal," and no demand was made for payment of the interest for several years, it was held that the direction to accumulate was to the trustees, and that the obligant was not liable in compound interest.[3]

SECTION IV.

Order of Preference of Legatees, and Abatement of Legacies.

Legacy liable to be diminished by claims of testator's creditors.

1065. A legacy may suffer abatement or diminution either in consequence of the act of the testator, as when he leaves a legacy of an heritable subject burdened with a debt or specific provision,[4] or in consequence of the liability of the estate for the testator's debts. Questions of abatement may arise between the residuary estate and the general and specific legatees, between heirs and executors, and between liferenters and fiars.[5]

Specific legacies do not abate until other funds exhausted.

1066. Subject to the observations already made respecting the incidence of burdens, the rule is, that legacies and dispositions of specific subjects do not suffer abatement until the general estate is

[1] *Smith* v. *Barlas*, 14 Jan. 1857, 19 D. 267.

[2] *Menzies* v. *Livingston*, 27 Feb. 1839, 1 D. 801; *Steel's Trs.* v. *Cooper*, 16 June 1830, 8 Sh. 926; *Dudgeon* v. *Arnot*, 19 Nov. 1830, 9 Sh. 36.

[3] *Gunn* v. *Gordon's Trs.*, 8 July 1854, 16 D. 1027. In England compound interest can only be claimed in virtue of a special direction in the will; *Arnold* v. *Arnold*, 2 My. & K. 365.

[4] *Frew* v. *Frew*, 15 Feb. 1828, 6 Sh. 554; and cases cited *infra*.

[5] See Chapter LXX. (Liabilities of the Real and Personal Estates).

exhausted.[1] And a declaration that a specific legacy shall abate in a particular contingency is to be strictly construed. Thus, where a truster left a house to his niece, and certain heritable estate to his nephews, with a power in favour of one of them to take over the estate on condition of paying certain legacies to the other beneficiaries, and, *inter alia*, a legacy of £500 to the niece, and the nephew did not exercise the option of taking over the heritable estate, so that the niece was not entitled to have her legacy of £500 paid preferably out of it, and the residue was exhausted by payment of debts, it was held that as the nephews' and niece's provisions were of the nature of special legacies, the outstanding debts remaining after the exhaustion of the general estate must be allocated rateably upon both subjects.[2] A legacy secured unconditionally upon subjects specifically destined must be paid in full, notwithstanding that the subject has already suffered abatement in consequence of the insufficiency of the general funds.[3]

General legacies do not abate until residue exhausted.

1067. As general legacies are preferable to residuary, it follows that in the case of a deficiency of funds to meet the claims of creditors, they are subject to abatement *pro rata* only after the exhaustion of the residue.[4] In an English case where a testamentary estate was originally sufficient for the payment of debts and legacies, but in consequence of the fraud of the trustee a part of the estate was lost, it was held that the loss ought not to be borne exclusively by the residuary legatees, but that the pecuniary legacies should also suffer a proportionate abatement.[5] Legacies

[1] In the English case of *Page* v. *Leapingwell*, 18 Ves. 463, the principle was laid down by Sir W. Grant, that although a legacy was in form residuary, yet if the intention appeared to be to give it as a specific legacy, it should only suffer abatement with other specific legacies. The distinction is a very shadowy one. In a later case, where a testator, having a power of appointment by will over £7100 3¼ per cents., appointed £5000 to A., £500 to B., and the *residue* to C., and the stock had become liable to the payment of his debts, Sir John Romilly, M.R., held that the principle of *Page* v. *Leapingwell* was inapplicable, and that the debts were chargeable in the first instance on the residue. In this case the amount of the bequest was uncertain, being dependent on the value of the stock when it came to be sold. But, added his Honour, if it had appeared that the testator thought he was dealing with the sum of £7100 sterling, and he had divided it into different proportions, the loss would then have fallen on all the persons interested in proportion to their shares, although the last portion were called the residue; *Petre* v. *Petre*, 14 Beav. 197.

[2] *Greig's Trs.* v. *Greig*, 6 June 1854, 16 D. 899. See *Dennistoun* v. *Dennistoun*, 12 Dec. 1821, 1 Sh. 206, N.E. 195.

[3] *Fergus* v. *Fergus*, 7 Feb. 1833, 11 Sh. 362.

[4] Ersk. 3, 9, 11, and 12; Bell's Prin. §§ 1875-7. In England it is held that a demonstrative legacy, that is, a legacy secured on a particular fund, is entitled to the privileges of a specific legacy in regard to exemption from liability to abatement until other general legacies have been exhausted; *Roberts* v. *Pocock*, 4 Ves. 150; *Lambert* v. *Lambert*, 11 Ves. 607.

[5] *Baker* v. *Farmer*, Law Rep. 4 Eq. Ca. 382.

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for charitable purposes have no preference over other legacies.[1] A direction to trustees to employ the surplus of personal estate in the purchase of lands, to be entailed on heirs of the truster, is, in a question of liability, simply a residuary destination.[2] One question of abatement of general importance (amongst a multitude of cases which are circumstantial) has been decided, viz., that where the deficiency of the testamentary estate results from the election of a widow or child in favour of legal claims, the order of abatement is unaltered, the order of preference being, 1*st*, the specific legacies, 2*dly*, general legacies, and *lastly*, the residue.[3]

Preference of legatees in virtue of express testamentary provisions in their favour.

1068. A testator may so frame his settlements as to confer a preference on one or more of the general legatees to the exclusion of others. In addition to the cases on annuities, to be afterwards noticed, reference is made to *Currie* v. *Currie*,[4] where a testatrix, believing that she had the power to dispose of £3500—£1000 of which was secured to her by antenuptial contract, and the remainder by a postnuptial settlement, which the husband had afterwards revoked—gave the sum of £1000 sterling to her daughter, to be at her own absolute disposal, and declared that the *remaining* sum of £2500 sterling should remain invested for the liferent use allenarly of the said daughter, and of her children in fee. The free fund being reduced to £1000 in consequence of the revocation of the postnuptial contract, the Court were of opinion that the intention was to give the first sum of £1000 preferably, and directed the whole fund to be paid over to the daughter. And where by a codicil a testator withdrew his moveable estate from the operation of a general settlement, and the heritable estate proved insufficient to meet the claims upon it, it was held that the legacies given by the general settlement must suffer a proportional abatement, and that the deficiency was not chargeable against the moveable estate.[5] Where trustees are directed to invest or set apart a sum of money in a particular way, or in particular stocks, the legatees are entitled to the benefit of an investment equal in value to what might have been obtained for the money at the truster's death.[6]

Liferent interests: to what extent subject to abatement.

1069. Questions of abatement of annuities or gifts in liferent are determined on similar principles. Thus, where a testator provided a jointure to his widow, and divided the residue of his

[1] *Monro* v. *Scott's Exrs.*, 1630, M. 8048.

[2] *Hamilton* v. *Bennett*, 16 Aug. 1833, 6 W. & S. 533, affirming 10 Sh. 330.

[3] *Tait's Trs.* v. *Lees*, 1886, 13 R. 1105.

[4] *Currie* v. *Currie*, 22 Jan. 1835, 13 Sh. 290. See the English cases cited in 2 Wh. & T. L. Ca. 6th ed. 304.

[5] Sp. Ca. *Hood's Exrs.*, 1869, 7 Macph. 775. See also *Chivas' Trs.* v. *M'Leod*, 1881, 9 R. 86.

[6] *Horsburgh* v. *Horsburgh*, 1 Mar. 1848, 10 D. 824; *Gray* v. *Gray*, 4 June 1835, 13 Sh. 866.

heritable estate into shares, certain of which were to be liferented by his daughters, the son's shares to be paid absolutely, it was held that interest due on heritable debt, and also the widow's jointure, were to be paid out of the residue in such way as to affect the provisions of the sons and daughters rateably.[1]

1070. The expense of opposing an application for the appointment of a judicial factor on a trust-estate was held to be chargeable against the capital of the estate, and not against the liferent, on the principle that it was an extraordinary expenditure incurred in defending the trust.[2]

SECTION V.

Residue (Entire or in Shares); given as Money, or in Forma Specifica.

What words constitute a residuary interest.

1071. After the special purposes of a settlement have been fulfilled, there may remain a surplus fund or residue; and the disposal of this surplus is usually the subject of the ultimate purpose of the settlement. No particular form of words is requisite to the effectual constitution of a destination of residue, and there is no presumption against double provisions applicable to residue. If a legacy is given to one of a family, and the residue is divided by a direction in general terms amongst the family, the special legatee is entitled to the *precipuum* over and above his share of the general estate.[3] The presumption being very strong against the supposition of partial intestacy, it is scarcely possible that a testator meaning to dispose of the residue of his estate should fail to express his intention in adequate language.[4] A testator, however, while intending to dispose of his whole estate, may fail to make provision for some contingency; and, unless he has guarded the settlement by a residuary clause broad enough to cover everything, the lapsed interest will result to his legal representatives.[5]

[1] *Dennistoun* v. *Dennistoun*, 12 Dec. 1821, 1 Sh. 206, N.E. 195. In the following cases a widow's annuity was held to be preferable to other legacies; *Kinmond's Trs.* v. *Kinmond*, 1873, 11 Macph. 381; *Adamson's Trs.* v. *Adamson's Exrs.*, 1891, 18 R. 1133; and see *Hutcheson's Trs.* v. *Hutcheson*, 1886, 13 R. 915.

[2] *Baxter and Mitchell* v. *Wood*, 24 March 1864, 2 Macph. 915; *M'Eachern* v. *Campbell's Trs.*, 26 May 1865, 3 Macph. 833.

[3] Sp. Ca. *Bryce's Trs.*, 1878, 5 R. 722.

[4] Some decisions upon expressions which have been held to comprehend residue will be found in Chapter XVIII., Section II. Words and expressions which are properly applicable to corporeal moveables will not be extended in meaning so as to include residue,—*e.g.*, a bequest by an officer in the army of "my uniforms and all other personalities, except such as I may specially bequeath to others,"—Sp. Ca. *Douglas' Exrs.*, 1869, 7 Macph. 504.

[5] The extent of the residuary interest

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Lapse avoided by a general residuary destination of estate.

1072. The subject of lapsed or resulting interests, including the consideration of the circumstances in which a lapse may occur, and the avoidance of a lapse in cases where a beneficiary interest is given to the trust-disponee, is elsewhere considered.[1] As preliminary to the examination of the question, what interests are carried by a residuary clause, it will be proper to enumerate the various conditions which may lead to a partial failure of the testator's intentions.

How a right may either become lapsed, or may fall into residue.

1073. Where there is a partial disposition or bequest to certain persons for purposes to be afterwards declared, and the testator dies without executing any deed of appropriation ;[2] or for trust purposes, which are set aside by the Court as vague, inextricable,[3] or unlawful,[4] or which do not exhaust the estate ;[5] or upon trust to be distributed at the discretion of a party who dies leaving the power unexecuted,[6] or for purposes which lapse by the failure of the beneficiary,[7] or in consequence of his being excluded by the law of approbate and reprobate ;[8] in any of these cases the beneficial interest will either fall into residue or result to the legal representatives. And although the entire interest in estate which is the subject of disposition[9] or bequest[10] is not in so many words impressed with the character of a trust, yet if a trust is declared of any part of the estate, the presumption is, that no beneficial interest was meant to be given to the disponees. In the absence of a residuary clause, such interests will therefore result to the legal representatives.

must be estimated as at the conclusion of the trust management, and not at the testator's death,—*Mackenzie's Trs.* v. *M'Dowall*, 11 March 1852, 14 D. 739. But see *Adv.-Gen.* v. *Hill*, 19 March 1862, 24 D. 808.

[1] Chapters XLIV. and LVII.

[2] *Sinclair* v. *Traill*, 27 Feb. 1840, 2 D. 694 ; but see *Alston* v. *Marshall*, 2 July 1833, 11 Sh. 868 ; *Irvine* v. *Bannerman*, 20 June 1844, 6 D. 1173.

[3] Bell's Pr. § 1884 ; *Mason* v. *Skinner*, 6 March 1844, 16 Jur. 422, and sequel of *M'Nair's* case there stated.

[4] *Lord* v. *Colvin*, 7 Dec. 1860, 23 D. 111 ; *Keith's Trs.* v. *Keith*, 17 July 1857, 19 D. 1040.

[5] *Macfarlane* v. *Cranstoun*, 12 Dec. 1823, 2 Sh. 578, N.E. 496 ; and see as to resulting interests under Charitable Trusts, Chapter LVII., Section II.

[6] *Dundas* v. *Dundas*, 27 Jan. 1837, 15 Sh. 427 ; *Pursell* v. *Elder*, 19 D. 71 ; 3 Macph. (H.L.) 59, 4 Macq. 992.

[7] *Torrie* v. *Munsie*, 31 May 1832, 10 Sh. 597 ; *Nasmyth* v. *Hare*, 17 Feb. 1819, F.C. ; *Lord* v. *Colvin*, 15 July 1865, 3 Macph 1083.

[8] *Nisbet's Trs.* v. *Nisbet*, 5 Dec. 1831, 14 D. 145 ; *Peat* v. *Peat*, 14 Feb. 1839, 1 D. 508.

[9] *Finnie* v. *Commrs. of Treasury*, 30 Nov. 1836, 15 Sh. 165 ; *Henderson* v. *M'Culloch*, 12 June 1839, 1 D. 927 ; *Hamilton* v. *Gordon*, 1724, M. 6588 ; *Blackwood* v. *Dykes*, 11 Sh. 443.

[10] *Soutar* v. *M'Grugar*, 22 Jan. 1801, M. "Implied Will," App. No. 2 ; *Ramsay* v. *Anderson*, 26 Feb. 1836, 14 Sh. 570 ; *Miller* v. *Black's Trs.*, 14 Sh. 555, 14 July 1837, 2 S. & M'L. 866 ; *M'Leish's Trs.* v. *M'Leish*, 25 May 1841, 3 D. 914. The cases noted in this paragraph include those of lapsed interests falling to the heir-at-law, and are cited as illustrations of the various modes in which a testamentary purpose may fail.

What interests fall into residue on the failure of the special purpose: Legacies.

1074. In numerous cases,[1] in which general or specific[2] legacies and provisions have been found to become lapsed in consequence of the legatee not surviving the period of vesting, residuary legatees have been held entitled to the lapsed succession. It is of no consequence whether the testator was or was not in the actual enjoyment of the estate, if he was in a position to dispose of the interest in it after his death. Thus, where a power was conferred on an annuitant of disposing and conveying at pleasure the capital sum of a fund set apart for payment of the annuity, it was held that a general settlement executed before the power came into operation carried the fee to the annuitant's residuary legatees.[3] A residuary clause carries a bonus on bank stock forming part of the estate;[4] and such a clause was held to comprehend the reversionary interest in a policy of assurance which had been assigned, by *ex facie* absolute disposition, in security of a debt.[5]

Estates subject to power of disposal.

Bonuses on stock.

Proceeds of policies of assurance.

Legal claims of widow and children.

1075. Interests resulting by the operation of the law of approbate and reprobate fall into residue. Thus, where a provision in favour of the testator's children, with right of survivorship, was charged on heritable estate in Scotland, and one of the children claimed legitim, the lapsed interest was found not to be subject to accretion, but to devolve to the residuary legatee, so as to enlarge the fund out of which the legitim was payable.[6]

Legacy charged on heritable estate.

1076. Several cases will be found among the English decisions on the question whether lapsed legacies charged on real estate will fall into a residue limited to personalty.[7] In the case of the *Advocate-General* v. *Williamson*,[8] where a power of sale for the purpose of distribution was held effectual to change the succession from heritable to moveable, it was assumed that the expression "means and effects" would carry the residuary proceeds of the heritable estate, for legacy duty was charged upon the whole estate considered as *testate* succession. It therefore appears that a residuary clause conceived in terms applicable in a strict sense to moveable estate only, would be sufficient to carry a lapsed interest under a bequest of a sum of money which is appointed to be paid out of the proceeds of the general heritable estate. But a legacy

Proceeds of converted heritage.

[1] See Chapters XLIII. and XLIV. (Law of Vesting); *Scott* v. *Scott*, 7 Feb. 1843, 5 D. 520.

[2] *Earl of Moray* v. *Stuart*, 1782, M. 8103.

[3] *Hyslop* v. *Maxwell's Trs.*, 11 Feb. 1834, 12 Sh. 413.

[4] *Cumming* v. *Cumming's Trs.*, 26 Feb. 1824, 2 Sh. 743, N.E. 620.

[5] *Marquis of Queensberry* v. *Scottish Union Insurance Co.*, 8 March 1842, 1 Bell, 183, affirming 1 D. 1203.

[6] *Breadalbane's Trs.* v. *Pringle*, 15 June 1841, 3 D. 357. See *Peat* v. *Peat*, 14 Feb. 1839, 1 D. 508.

[7] *Amphlett* v. *Parke*, 2 R. & M. 232; *M'Lelland* v. *Shaw*, 2 Sch. & Lef. 545, and cases in Lewin on Trusts, chapter 8.

[8] *Adv.-Gen.* v. *Williamson*, Ex. Rep. No. 1; 13 D. 436, 2 Bell, 89.

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charged as a burden on an estate which is the subject of a special destination can scarcely be held to be within the scope of a residuary clause; and if the bequest failed, we should think the heir to whom the estate was destined would be entitled to the benefit of the failure.

Surplus proceeds of a residue burdened with annuities.

1077. Where the distribution of a testamentary estate is postponed in consequence of the existence of annuities for life, it is held that the accumulations of the surplus proceeds belong to residue.[1] For determining the respective interests of the annuitants and the residuary legatees in the annual proceeds of a fund which was charged with an annuity in equal shares, the following rules were laid down by the House of Lords in the case of *Casamaijor* v. *Pearson*:—(1) that the annuitants were respectively entitled to payment of their provisions for any one year, only in so far as the free annual proceeds of the fund during such year were sufficient for the payment thereof; (2) that when in any year the free proceeds exceeded the aggregate amount of the annuities, the surplus belonged to the residuary legatees; and (3) that on the death of either annuitant the survivor was entitled to payment of one-half of the fixed annuity if the interest of the residue were sufficient to satisfy the claim.[2] Where a liferent interest lapses in consequence of the widow claiming her legal provisions, the interest of the fiar is not thereby enlarged, nor does it emerge until the event of the death of the liferentrix; the intermediate proceeds fall into residue, to compensate the payment of the legal provision.[3]

Undisposed-of liferent interests.

Undisposed-of accumulations of interest.

1078. With regard to the interest or annual proceeds of estate not specially appropriated, whether heritable[4] or moveable,[5] the general rule is—subject to the limitations introduced by the Thellusson Act and 55 and 56 Vict., cap. 58—that such proceeds are accumulated for the benefit of the beneficiaries entitled to residue, until the arrival of the period of division. Where the payment of a residue given to minor children is deferred until the attainment of

[1] *Ramsay* v. *Anderson*, 26 Feb. 1836, 14 Sh. 570; *Casamaijor* v. *Pearson*, 29 April 1841, 2 Rob. 217; *Sturgis* v. *Campbell*, 23 D. 1128; 19 May 1865, 3 Macph. (H.L.) 70; and see Section II., *supra*.

[2] 2 Rob. 217; but see *Boyd* v. *Boyd*, 5 July 1851, 13 D. 1302; *Berry's Trs.* v. *Cox's Trs.*, 18 June 1850, 12 D. 1037.

[3] *Dixon* v. *Fisher*, 1 July 1833, 6 W. & S. 431, affirming 10 Sh. 55; *Peat* v. *Peat*, 14 Feb. 1839, 1 D. 508; and see *Rutherford* v. *Turnbull*, 29 May 1821, 1 Sh. 37, N.E. 38.

[4] *Templer* v. *Templer*, 1 April 1828, 3 W. & S. 47, affirming 4 Sh. 460. But where provisions are appointed in virtue of a power to charge the rents of an entailed estate during a term of years, it would seem the interest of the rents is not chargeable; *Earl of Wemyss* v. *Trail* 22 Nov. 1810, F.C.

[5] *Pursell* v. *Newbigging*, 19 D. 71; 24 March 1865 (*nom. Pursell* v. *Elder*), 3 Macph. (H.L.) 59, 4 Macq. 992; *Sturgis* v. *Campbell*, *supra*; *Campbell* v. *Reid*, 12 June 1840, 2 D. 1084.

the age of majority, a power to provide for their maintenance out of the interest may be inferred from slight indications of intention, if indeed it is not implied in the nature of the bequest.[1]

Interest on deferred legacy.

1079. The interest accruing on a deferred legacy of a special fund accresces to the capital, provided the legacy is held to vest at the testator's death.[2] Thus, where the interest of a fund was destined to the daughters of a testator in liferent, payable at marriage or majority, the trustees being empowered to expend such portions of the intermediate income as might be proper for their benefit during minority, it was held that the surplus income which had accrued during the minority of the legatees fell to be paid over to them absolutely.[3] But if the legacy be given in such terms that the right vests at the time to which payment is postponed, the intermediate interest will fall into residue, and it has been so held even where trustees were directed to set apart a sum to secure the eventual payment of the legacy.[4] Where a residue was given to minor children, payable as they should respectively attain the age of twenty-one, in equal shares, and the shares of the capital were found to vest in the several legatees at majority, it was held that, in order to accomplish the equality contemplated by the testator, the interest which accrued on each share in the hands of the trustees should be paid to each legatee along with his share of the capital.[5]

Interest of money directed to be laid out on land.

Interest of a fund directed to be invested in land, to be settled in accordance with the truster's directions, is payable to the heirs in the destination from and after the time at which the trustees ought, in the exercise of a reasonable discretion, to have made the investment.[6] Where the trust depends on the occurrence of a contingency, the interest will fall to be added to the principal, subject to the statutory restraint applicable to accumulations.[7]

Undisposed-of capital: where interest given in liferent.

1080. Where the interest of a fund is directed to be applied for the use of a beneficiary, it is a question of intention whether the capital is to be regarded as residue, or as impliedly given to the legatee. If the apparent object is to withhold the payment of the capital for the purpose of more effectually securing the subject as an alimentary fund, a legacy of the capital may be implied.[8]

[1] *Campbell* v. *Reid*, *supra*. See Section II.

[2] *Glasgow's Trs.* v. *Glasgow*, 30 Nov. 1830, 9 Sh. 87; *M'Alister* v. *M'Alister*, 30 Nov. 1836, 15 Sh. 170.

[3] *Graham* v. *Graham's Trs.*, 12 Feb. 1863, 1 Macph. 392.

[4] *Playfair's Trs.* v. *Hunter*, 1890, 17 R. 1241.

[5] *Smith's Trs.* v. *Ferguson*, 4 Dec. 1867, 6 Macph. 83.

[6] See the cases on this point discussed in Chapter LVI., Section II.

[7] *Earl of Bective* v. *Hodgson*, 33 L.J. Ch. 601.

[8] *Sanderson's Exrs.* v. *Kerr*, 21 Dec. 1860, 23 D. 227; and see *Burnsides* v. *Smith*, 10 June 1829, 7 Sh. 735; *Blann* v. *Bell*, 5 De Gex & Sm. 658; 2 Roper on Legacies, 1475; Broom's Legal Maxims, 606; Williams on Executors, 8th ed. 1199; and see Chapter XVI., Section III. (Interests arising by Implication).

CHAPTER XXXI.

Lapse caused by the failure of one or more of the residuary legatees.

1081. Even where a testator has provided by a total settlement, containing a general residuary destination, for the disposal of his entire succession, it may happen that his intentions are partially defeated by the occurrence of a lapse; as, for example, in the case of the predecease of one or more of the parties to whom shares of the residue are given,[1] or through the non-exercise of a power of disposal given to a liferenter,[2] or in the case of a repudiation of the settlement by some of the parties.[3] The case of *Nisbet's Trustees* v. *Nisbet* [4] decided that where a residuary legatee obtained a decree of reduction of the settlement *quoad* the heritable estate *ex capite lecti*, and thereby forfeited his residuary interest in the moveable estate, his share did not result to the next of kin, but became divisible among the co-residuaries.

In case of residuary legatee repudiating the settlement, his share accrues to the co-residuaries.

In case of predecease of a residuary legatee, his share results to the next of kin.

1082. The rule is different in the case of a share of residue becoming vacant in consequence of the predecease of the legatee. In that case the law has been settled, since the decision in *Torrie* v. *Munsie*, that a lapsed share of residue results to the testator's next of kin,[5] unless the destination of residue is conceived in terms which give a joint interest to the residuary legatees.[6] However, in a case where a testator divided the residue of his estate into twenty-four equal shares, reserving power to dispose of two of the shares which he left unappropriated, with a precatory direction that, in the event of his failing to do so, the amount of the unappropriated shares should be merged in the general division, it was held by Lord Wood, in consideration of the manifest intention of the testator to exclude any resulting interest, that the share of a predeceasing beneficiary ought to follow the residuary destination impressed upon the unappropriated shares.[7]

Lapse of residue avoided by destination-over in case of failure.

1083. Provision may, and generally ought to be made against the occurrence of a lapse of shares of succession by the insertion of a clause of survivorship, or other ulterior residuary destination. Where the residue of an estate was destined to the children of A. and B. in equal shares, it was observed, that although this destination, being in severalty, would not carry a lapsed share over to survivors, yet the added words, "I hereby appoint the children of

[1] *Torrie* v. *Munsie*, *infra*.

[2] *Alves* v. *Alves*, 8 Mar. 1861, 23 D. 712.

[3] *Nisbet's Trs.* v. *Nisbet*, *infra*.

[4] *Nisbet's Trs.* v. *Nisbet*, 5 Dec, 1851, 14 D. 145; *Breadalbane's Trs.* v. *Lady E. Pringle*, 15 June 1841, 3 D. 357; and see *Russell* v. *Russell*, 25 Feb. 1835, 13 Sh. 551.

[5] *Torrie* v. *Munsie*, 31 May 1832, 10 Sh. 597.

[6] *Brown* v. *Campbell*, 16 Mar. 1855, 17 D. 759; *Thorburn* v. *Thorburn*, 16 Feb. 1836, 14 Sh. 485; *Robertson* v. *M'Vean*, 10 Dec. 1819, Hume, 273; *Arbuthnott* v. *Arbuthnott*, 7 June 1816, Hume, 274.

[7] *Irvine* v. *Bannerman*, 20 June 1844, 6 D. 1173; and see *Alston* v. *Marshall*, 2 July 1833, 11 Sh. 868.

the said A. and B. to be my residuary legatees," implied a gift of the entire residue in favour of the *surviving* children, and were effectual to exclude any claim that might be preferred by the next of kin.[1] In taking instructions for a settlement, the attention of the testator ought to be directed to the necessity of providing against a total or partial failure of the primary destination of the residue.

[1] *Alves* v. *Alves*, 8 Mar. 1861, 23 D. 712 ;-per Lord J.-C. Inglis, 716.

CHAPTER XXXII.

OF CONDITIONS IN LEGACIES AND PROVISIONS.

1. Conditions obligatory on the Legatee or Donee. | 2. Charges and Burdens affecting the subject of the Gift.

SECTION I.

Conditions obligatory on the Legatee or Donee.

Conditions precedent and subsequent, how distinguished.

1084. Conditions in testamentary settlements are distinguished according to their mode of operation, and are either precedent or subsequent; that is to say, either the vesting of the succession is made contingent on the determination of an event in favour of the legatee, or the provision is so framed that the legatee is divested by the determination of an event in favour of some other person. Conditions subsequent are construed in a stricter sense than conditions precedent, because the policy of the law, while it does not absolutely prevent, is at least unfavourable to the imposition of conditions the effect of which is to divest a person who has already acquired an interest in a succession.[1]

Conditions potestative or casual.

1085. Conditions are also divided, with relation to their object, into potestative and casual conditions. A potestative condition makes the gift dependent on an act, the performance of which is within the power of the legatee; and the object of such conditions is to secure performance.[2] Potestative conditions accordingly become obligatory on the legatee by acceptance of the grant; a principle which has been treated by some writers as an extension of the doctrine of approbate and reprobate. Casual conditions are those which are determined by the occurrence of an event, such as the death of a liferenter, the attainment of majority, the succession to another estate, &c. Such conditions, when not dictated by pure caprice, usually bear relation to some change in the circumstances of the legatee, or of some other party to whom a prior interest in the same subject is limited.

Conditions obligatory or unlawful.

1086. Lastly, conditions are distinguished in relation to their obligatory character. A condition which is lawful and possible is

[1] Bell's Pr. § 50; Jarman on Wills, chap. 27.

[2] For example, a legacy may be burdened with debt, or the legatee may be taken bound to pay the granter's debts, as in *Moncrieff* v. *Skene*, 29 June 1825, 1 W. & S. 672; *Bruce's Trs.* v. *Hamilton*, 29 Jan. 1858, 20 D. 473.

obligatory; the effect of conditions which are either unlawful or impossible of fulfilment remains for consideration.

Potestative conditions divided into imperative and prohibitory.

1087. In addition to the recognised grounds of distinction which have been noticed, it is necessary, in regard to potestative conditions, to keep in view the practical distinction between imperative and prohibitory conditions. An imperative condition is binding, unless the act enjoined be contrary to law. A prohibitory condition may be legally inoperative, on the ground of its having a tendency (1) to interfere with the personal liberty of the legatee, or (2) to alter or interfere with the right of property, although the fulfilment of the condition, if it had sprung from the spontaneous act of the legatee, might have been harmless or even laudable. A prohibitory condition is sometimes disguised in the form of an imperative one; and some of the confusion which pervades this branch of the law is perhaps attributable to the tendency of lawyers to look rather to the form than to the substance of the injunction. Take, for example, the condition that the legatee is to reside in a certain place. Discarding the form of the direction, this is obviously prohibitory; for residence *somewhere* being a necessary condition of existence, the direction to reside in one place is equivalent to a prohibition against residing in any other place. So an injunction to marry a particular person is in effect a condition in restraint of marriage.[1]

Effect of condition upon the vesting of the legacy.

1088. Referring to the observations introductory to the law of vesting, it will be seen that proper questions of vesting can only arise with reference to casual conditions; that is, conditions which are determined by an event and not by the will of the legatee. A potestative injunction is, in the intention of the testator, necessarily a condition affecting the acquisition of a vested interest: but a legacy given upon a particular event may not be so. If, for example, a legacy is made payable upon the occurrence of an event which must happen, although uncertain as to time, the interest of the legatee vests *a morte testatoris*, though the period of payment is postponed; and the interest may accordingly be assigned or attached by legal diligence. If, on the other hand, it is uncertain that the event contemplated by the testator ever will happen, the event is regarded as a condition—*dies incertus pro conditione habetur*.[2] The subject of legacies to trustees and executors is elsewhere considered. Where the legacy is given to the trustee or executor in that character, his acceptance of the office seems to be a condition affecting his right to the bequest.

Eventual conditions.

Legacies to trustees.

[1] See the cases on residence, *infra*.

[2] A bequest to be paid at a distant time, along with certain contingent legacies, vests immediately, if the contingency be not imported into the particular gift; *Grant* v. *Cowe*, 1887, 15 R. 81.

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Conditions relating to succession to other estates.

1089. A condition of frequent occurrence in settlements is, that the disposition shall not take effect in the event of the legatee succeeding to a certain other legacy or estate, or to estate of a certain value.[1] Such stipulations are effectual though expressed in the form of conditions subsequent with a destination-over, provided there is a clear purpose of substitution,—subject always to the operation of the rules of law restrictive of substitutions.[2]

Conditions relating to time.

1090. The case of legacies contingent on the legatee's survivance of a definite period of time is exemplified by the case of *Wilkie* v. *Wilkie*. The testator had directed his trustees to retain his lands of Auchleshie in their management for fourteen years after his decease, and thereafter to sell the lands, and to divide the proceeds among all his children then in life, or their issue, the shares of predeceasing children to accresce to the survivors. One of the sons died whilst the sale was in progress, and the Court found that no share of the price or value of the lands could be held to have vested in the son at the time of his death, but that his share accresced, in terms of the trust-deed, to the surviving children.[3] In other cases, where a right of liferent was given subject to the condition of survivance, the right to the fee has been held to be affected by the same condition.[4] A right to participate in the profits of a business assumes that there is a solvent going business at the time of payment, and the legatee cannot rank in competition with creditors.[5]

Condition that the legacy is claimed.

Arbitrary conditions.

1091. Where a legacy is left to a party on condition of his appearing to claim it within a certain time, failing which, to other parties, the legacy will vest in the eventual legatees at the expiration of the time appointed.[6] By parity of reasoning, it seems that the vesting of a provision contingent on marriage, on success in a suit, or on any other arbitrary but lawful condition, will only take effect upon the condition being purified;[7] and in general a condition which the legatee has the power of fulfilling is lawful if the act to be performed is lawful, *e.g.*, that the legatee shall execute a declaration that he desires to appropriate or test on a certain estate.[8]

[1] See *Ewing* v. *Ewing's Trs.*, 12 June 1857, 19 D. 835; affirmed 22 D. (App. Ca.) 5; *Cunningham* v. *Moncreiff*, 6 July 1858, 20 D. 1214; *Erskine* v. *Williams*, 14 Dec. 1843, 6 D. 226; *Lawson* v. *Imrie*, 10 June 1841, 3 D. 1001.

[2] *Kerr* v. *Thomson's Trs.*, 13 Dec. 1865, 4 Macph. 179.

[3] *Wilkie* v. *Wilkie*, 27 Jan. 1837, 15 Sh. 431; and see *Earl of Lauderdale* v. *Boyle's Exr.*, 19 May 1830, 8 Sh. 771; *Scott* v. *Scott*, 12 July 1860, 22 D. 1420.

[4] *Somerville's Trs.* v. *Dickson*, 3 March 1865, 3 Macph. 602.

[5] *Pollok and Sons' Tr.* v. *Pollok*, 1880, 7 R. 975.

[6] *Stevenson* v. *Macintyre*, 30 June 1836, 4 Sh. 776, N.E. 784; *Neilson* v. *Coutter*, 1710, 4 Br. Sup. 807.

[7] See *Hunter* v. *Nicolson*, 29 Nov. 1836, 15 Sh. 150; *Scot* v. *Seton*, 1708, M. 2998.

[8] *Reids* v. *M'Phedran*, 1881, 9 R. 80.

A bequest to members of a family of a particular religious profession is a good conditional legacy.[1] Where an annuity is given to a parent subject to the obligation of maintaining the family, the obligation is satisfied by an offer to maintain the child in family.[2] This is perhaps rather a trust than a condition. The ordinary rules as to election apply to legacies given under conditions.[3] Where a legatee has to give something or to pay something as a condition of receiving a legacy, his performance of the condition does not render him preferable to other legatees.[4] A legacy having been given to a parent upon the singular condition of his having two children living at any time, the condition was held not to be purified by the birth of a second child which lived only three-quarters of an hour, and had not been heard to cry.[5] In the case of a legacy, the amount of which is left to the discretion of trustees, the exercise of the power is regarded as conditional; and accordingly the legacy will lapse by the death of the trustee if he has neglected to exercise it.[6] Professor Bell remarks, that where the condition *si sine liberis* is *expressed*, the mere birth of a child, irrespective of its survivance, will give a vested interest; a distinction which is correct in principle, though it may be doubted whether, in the actual decision of such cases, attention has been paid to the difference between express and implied conditions.[7]

Conditions depending upon the birth of children.

1092. Where legacies have been given to a family of children, or to a parent failing issue of his body, and the circumstances were such as to render it improbable that additions would be made to the family, the Court has sometimes allowed payment to be made in anticipation of the period of vesting, on security being found for repayment in the event of the succession opening to future issue.[8] And it has been held, on the construction of a direction to convey residue to a party who was insane in the event of his recovery, whom failing to another, that the trustees were entitled to denude in favour of the conditional institute on the arrival of the period of distribution, the party first instituted being then in a state of mental incapacity.[9]

Bequest to insane person in event of restoration to sanity.

[1] *Hays* v. *Brown*, 1883, 10 R. 460.

[2] *Barry's Trs.* v. *Barry*, 1888, 15 R. 496.

[3] *Johnston* v. *Johnston*, 1875, 2 R. 936.

[4] *Cameron's Tr.* v. *Gow*, 1874, 1 R. 683.

[5] *Roberton* v. *Roberton*, 22 Jan. 1833, 11 Sh. 297, an unfortunate extension of a vicious rule of evidence.

[6] *Burnsides* v. *Smith*, 10 June 1829, 7 Sh. 735.

[7] Bell's Prin. § 1782. See also *Glendinning* v. *Walker*, 30 Nov. 1825, 4 Sh. 237, N.E. 241.

[8] *Scheniman* v. *Wilson*, 25 June 1828, 6 Sh. 1019; *Blackwood* v. *Blackwood's Trs.*, 11 June 1833, 11 Sh. 699. Compare these cases with *Biggar's Trs.* v. *Biggar*, 17 Nov. 1858, 21 D. 4.

[9] *Dron's Trs.* v. *Peddie*, 5 March 1850, 12 D. 825.

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Condition requiring the grantee to bear the granter's name and arms.

1093. One of the most common conditions in settlements of landed estates is, that the heirs of entail shall take and bear the name and arms of the entailer. Where the condition further requires that no other surname and arms shall be used, it is understood that the heir cannot conjoin another surname or quarter other arms with those of the entailer, but the question has not, so far as observed, been the subject of express decision. The rule of strict construction obviously involves the surrendering of other estates to which similar conditions are applicable. Where the entailer's family had not received a grant of arms from the Lord Lyon, the condition was held to impose upon the heir the obligation of obtaining a grant of arms distinctive of the entailer's family, and descending to the heirs of entail.[1]

Unlawful and impossible conditions: bequest effectual although condition unlawful or impossible.

1094. We proceed to consider the subject of unlawful and impossible conditions, a subject which involves the question in what circumstances a legatee is entitled to take a bequest free from a potestative condition. On this last point our law is free from an element of complexity which has entered into that of England in consequence of the Courts of Law there having adopted the principle that a devise of real property upon an impossible or unlawful condition is void, while the Courts of Equity, in the adjudication of questions of personal succession, have adhered to the maxim of the Civil Law, according to which such conditions are held *pro non scriptis*.[2] In the jurisprudence of Scotland, it is a universal rule that a bequest or voluntary provision, coupled with an unlawful or impossible condition, is effectual, the condition being either held *pro non scripto* or treated as satisfied because the executor or legatee has done all that is possible to satisfy the testator's requirement.[3] Thus, a legacy to purchase a commission in the army having accrued after the abolition of purchase, the legatee was held to be entitled to take the legacy discharged of the impossible condition.[4] Legacies and bequests may be said to be unlawful either when they are granted for an unlawful purpose, or when granted upon a condition such as the law will not enforce. The subject of unlawful purposes has been considered in a previous chapter, in conjunction with that of conditions which are void, as interfering unduly with the right of property.[5] As respects conditions in restraint of personal liberty, these are of rare occurrence in modern settlements. Two examples have attracted the attention of authors,—restraints on residence and restraints on marriage.[6]

Distinction between unlawful purpose and unlawful condition.

[1] *Moir* v. *Graham*, 1794, M. 15,537.

[2] 2 Jarman on Wills, 5th ed. pp. 849-54.

[3] See Bell's Pr. § 1785; Ersk. 3, 3, 85; Stair, 1, 3, 7.

[4] *Dunbar* v. *Scott's Trs.*, 1872, 10 Macph. 982; and see *Pirie* v. *Pirie*, 1872, 11 Macph. 94.

[5] Chapter XV., Section I.

[6] Of the same nature is the condition

Conditions requiring or prohibiting residence.

1095. Two cases are reported on conditions as to residence. In the first, *Reid* v. *Coates*,[1] the legacy was given by an uncle, coupled with the condition that the legatee should not reside with his mother. The Court, before deciding the question, inquired whether the legatee intended to observe the condition of separate residence; and having received an answer amounting to a *non repugnantia*, they refused to interfere, as it was not unlawful for the legatee to fulfil the condition. In the subsequent case of *Fraser* v. *Rose*,[2] the Court seems to have gone further, and to have held the condition of non-residence with the legatee's mother, she being of good character, altogether nugatory. The doctrine that a degrading or contumelious condition may be disregarded certainly commends itself to reason; but we incline to think that a condition enjoining residence in a particular place is lawful, on the principle that the testator may desire his representative to keep up a connection with the locality of his choice, and that the condition is sufficiently complied with by having a home or place of residence in the locality, and occasionally visiting it.[3] As to restraints on residence with the legatee's parents or near relatives, the case of *Fraser* v. *Rose* proves that the Court will not enforce the condition without inquiring into its reasonableness. If, therefore, the condition be capricious or unreasonable, it may be disregarded.

Conditions in restraint of marriage, within what limits effectual.

1096. Restraints on marriage are clearly illegal and inoperative when they are, either in form or in effect, equivalent to total prohibition.[4] It may be added, on the authority of the English decisions on wills, that a restriction of the legatee's choice to a particular person, or to members of a particular class or profession, is void, as having a tendency to absolute prohibition;[5] but it is not clear that the exclusion of a particular person or class of persons[6] would be objectionable. Conditions as regards time are

sometimes attached to a provision in favour of a minor, that the parents shall not interfere with the education or upbringing of the child, but shall defer in these matters to the testamentary guardians or trustees; see *Charteris* v. *The Lord Advocate*, 22 Feb. 1750, 1 Cr. St. & Pat. 463.

[1] *Reid* v. *Coates*, 5 Mar. 1813, F.C.

[2] *Fraser* v. *Rose*, 18 July 1849, 11 D. 1467.

[3] A donor may, of course, make it a condition of a provision that the donee is no longer to reside with him; see *Patersons* v. *Paterson*, 26 Jan. 1849, 11 D. 441. As to residence, see 2 Jarman on Wills, 3d ed. p. 51; and case of *Fillingham* v. *Bromley*, T. & R. 530, where Lord Eldon compelled a purchaser to take a title, although the vendor's right was clogged with the condition of residence. See also *Stones* v. *Parker*, 29 L.J. Ch. 874.

[4] See the cases collected in Br. Syn. 458; and 2 Jarman on Wills, 5th ed. 900.

[5] See *M'Rath* v. *Alexander*, 1712, M. 2975.

[6] *Forbes* v. *Forbes' Trs.*, 1882, 9 R. 675; compare *Ommanney* v. *Douglas*, M. 2985, 15 March 1796, 3 Pat. 448, where the judgment of the Court of Session, rejecting the condition, was reversed, with *Keily* v. *Monck*, 3 Ridg. P. C. 205, where

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only valid when coupled with a dispensing power; *e.g.*, when it is provided that the legatee shall not marry in minority without the consent of guardians or trustees.[1] And, conversely, conditions involving the requirement of consent seem only to be binding when bearing relation to the period of legal minority, or such reasonable period of less-age as the testator may appoint. A provision to a wife upon condition *si vidua manserit et non nupserit* would seem to be lawful.[2] In practice it is not uncommon to restrict the amount of a widow's provision in the event of a second marriage,[3] and an annuity during viduity or until second marriage is effectual according to its terms.[4]

Condition *si vidua manserit.*

Conditions requiring the consent of trustees to the marriage of a legatee or disponee.

1097. In the interpretation of conditions as to marriage with consent of trustees, two principles have been established in favour of the legatee; first, that the trustees cannot refuse their consent except upon reasonable grounds; and secondly, that it is not necessary that the consent should be declared, it being sufficient that the trustees do not object to the marriage.[5] As a necessary consequence of the first of these propositions, it follows that, if the trustees withhold the desired consent capriciously, the legatee is free to marry without it, and by so doing does not forfeit the legacy.[6] The second proposition is illustrated by the case of *Wellwood's Trustees.* The truster had directed his trustees to entail and secure his lands of Foleyhill upon his granddaughter, Miss Boswell, and

a condition not to marry a man who was not seised of an estate in fee, or of perpetual freehold of the annual value of £500, was held to be too general, and therefore illegal.

[1] See *Buchanan* v. *Buchanan*, 1680, M. 2968; 3 Br. Sup. 335; *Fetternear* v. *Semple*, 1680, M. 2969.

[2] *Foulis* v. *Gilmour*, 1672, M. 2965; 2 Br. Sup. 160. A similar condition in a postnuptial contract, applicable to the second marriage of the *surviving spouse*, was held valid in *Kidd* v. *Kidd*, 10 Dec. 1833, 2 Macph. 227.

[3] *Smith's Trs.* v. *Smith*, 1883, 10 R. 1144.

[4] So held in the case of a gift of income to the truster's unmarried daughters, —*Sturrock* v. *Rankin's Trs.*, 1875, 2 R. 850.

[5] *M'Kenzie* v. *Kinminity's Cr.*, 1750, M. 2977, 6592; Elch. "Provisions to Heirs," No. 13.

[6] *Bunten* v. *Buchanan*, 1710, M. 2972; *Pringle* v. *Pringle*, 1688, M. 2972; 2 Br. Sup. 126; *Dalziel* v. *Scotstarvet*, 1688, M. 2971; *Gordon* v. *Petrie*, 1682, 3 Br. Sup. 433; *Foord* v. *Foord*, 1682, M. 2970. On the authority of Jarman (2, 46), it may be added that the Court of Chancery is also extremely liberal in construing expressions of consent, and it will presume consent from the absence of dissent, agreeably to the maxim, *qui tacet consentire videtur; Mesgrett* v. *Mesgrett*, 2 Vern. 580; *Daley* v. *Desbouverie*, 2 Atk. 261; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225. In *Pollock* v. *Croft*, 1 Mer. 181, where, under the circumstances, consent was not required to be in writing, a general permission to the legatee to marry according to her discretion appears to have been deemed sufficient, without any further consent. And in *Strange* v. *Smith*, Amb. 263, Lord Hardwicke held that a mother, whose consent *in writing* was required, had, by making the offer to and permitting the addresses of the intended husband, given a consent to her daughter's marriage which she could not retract, though no written consent had been given, as required by the settlement.

certain substitutes, with a proviso that, in the event of her marrying without the approbation of his trustees first had and obtained, her right and interest in the said lands should immediately cease and determine, fortified by a resolutive clause. Miss Boswell married in minority, without the knowledge of the trustees. In a multiplepoinding, brought for the purpose of ascertaining on whom the estate ought to be settled, the Court, on the suggestion of Lord Fullerton, required the trustees to state whether they were now willing to give their consent and approbation of the marriage. The trustees having given their consent by a minute, it was held that the wish of the testator had been sufficiently complied with.[1] The death of the party whose consent is required will, by rendering fulfilment of the condition impossible, enable the legatee to take the bequest unconditionally.[2] Where a father granted a bond of provision to his daughter (supposing her to be unmarried), to be null if she married without his consent, and having afterwards learned that she was married, he expressed his dissatisfaction, but received her into his family, the Court held that the provision was not exigible.[3]

1098. In England conditions in restraint of marriage have been held void, as being *in terrorem* merely,[4] when the will contained no destination-over in default. This element has not been much considered in the decisions of the Court of Session. Where a bequest is given absolutely, subject to a declaration that the subject shall not fall under the operation of the legatee's contract of marriage, the declaration may be inoperative if the legatee has by contract conveyed away estate to be acquired during the marriage. In this case the condition cannot be fulfilled; the legatee takes the legacy, and must fulfil the obligation to convey for the purposes of the contract of marriage.[5]

SECTION II.

Charges and Burdens affecting the Subject of the Gift.

Condition and burden distinguished.

1099. A legacy may be given under the condition that the legatee shall, in a certain event, or it may be in any event, make payment of a sum of money to a third person, or grant security over the subject to that person.[6] This is a proper case of a legacy given

[1] *Wellwood's Trs.* v. *Boswell*, 21 June 1851, 13 D. 1211.

[2] *Grant* v. *Dyer*, 1813, 2 Dow, 73.

[3] *Hay* v. *Wood*, 1781, M. 2982; Hailes, 864.

[4] 2 Jarman on Wills, 5th ed. 894.

[5] *Douglas' Trs.* v. *Kay's Trs.*, 1879, 7 R. 295; *Simson's Trs.* v. *Brown*, 1890, 17 R. 581.

[6] An example of such a condition is the case of *Falconar Stewart* v. *Wilkie*, 1892, 19 R. 631, where a condition of payment of £10,000 in case an estate were "disposed of" was enforced.

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under a condition; but in such a case the testator's object might be accomplished by directly burdening the subject of bequest, and it may be convenient to consider the two cases together.

Case of the subject of a specific gift which is afterwards charged with debt.

1100. There is not much settled law on the subject of legacies affected by charges or burdens. It is a principle of the law of Scotland, of respectable antiquity, that heritable debts in a question between heirs affect the subjects on which they are respectively secured in the absence of testamentary directions disburdening the lands, or directing payment to be made from other sources.[1] Thus, where lands were burdened to an extent exceeding their value, and these lands were afterwards left as a family provision to a lady in liferent, and her children in fee, the Court refused to allow a proof of facts and circumstances showing that the testator intended to cancel the bond, and to treat the debt as one affecting his general estate.[2] The case was certainly a hard one for the legatees, but it must be admitted that the proof demanded could not be brought within any of the known categories of admissibility of extrinsic evidence in aid of the construction of wills. In another case, where heritable estate was left to a legatee "under burden of any heritable securities that may affect the same, and the . . ground-annual affecting it," and the testator afterwards purchased the ground-annual and redeemed the bond, taking assignations to both, it was held that the legatee took the estate discharged of the heritable debt, but burdened with the ground-annual.[3] The distinction here taken is not very clear, because, if the case has to be decided as a question of property, it would seem that the act of taking an assignation to the debt, instead of a discharge, was sufficient to prevent its extinction (as has been held in entail cases), while, if the question be one of intention, the presumed intention would be the same as to both debts.

Case of a moveable subject which is afterwards impledged.

1101. On the cognate question of the effect of a bequest of a moveable subject which the testator has burdened or impledged, there is a decision by Lord Kyllachy,[4] who in his judgment states that no direct Scottish authority on the point could be found. "According to English law, a specific legatee is entitled to have his legacy redeemed at the expense of the testator's general estate from charges created by the testator;[5] and although the rule as regards bequests of real estate appears to be altered by the Act 17 and 18 Vict., cap. 113, I do not find that there has been any alteration by

[1] The effect of such directions is considered in a subsequent chapter (Chapter LXX., Section IV.).

[2] *Brand* v. *Scott's Trs.*, 1892, 19 R. 763.

[3] *Murray* v. *Parlane's Tr.*, 1890, 18 R. 287.

[4] *Stewart* v. *Stewart*, 1891, 19 R. 310.

[5] *Bathamley*, L.R. 20 Eq. 304; *Ashburner*, 2 Br. Ch. Rep., 113; Williams on Executors, 1332.

Statute with respect to specific legacies of moveable subjects. As expressed by Lord Thurlow in the case of *Ashburner* (cited below), 'If a testator gives a cup which is in pawn, it is a full gift, and the executor must redeem.' The rule seems to be the same in the Civil Law, at all events it seems to have been so settled by the time of Justinian,—Inst. ii. 20, 12."[1] This, however, in his Lordship's opinion, had never been recognised as the law of Scotland, and the policy of assurance, which in this case had been assigned in security of advances, was held to be bequeathed *cum onere*. It seems to the writer that the principle of this decision may also be deduced from the principle of the ademption of specific legacies, because the impledging of a moveable is a partial ademption. That the Roman law did not so regard it is a weighty circumstance, but where the principles of the Roman law are not consistent, we may choose the principle which we think best and most accordant with the nearest analogies in our own system.[2]

[1] 19 R. 311, note.

[2] A testamentary burden on a subject specifically bequeathed is preferable to the specific bequest, and must be paid in full even where there has been abatement of the specific bequest,—*Fergus* v. *Fergus*, 1833, 11 S. 362; compare *Greig's Trs.* v. *Greig*, 1854, 16 D. 899.

CHAPTER XXXIII.

GIFTS SUBJECT TO LIFERENTS OR LIFE INTERESTS. (INCLUDING FEE AND LIFERENT.)

1. Construction in Dispositions to Strangers, or to Spouses and Children nominatim.
2. Gifts to Children nascituris, subject to a Liferent or Life Interest in the Parent.
3. Estate of a Beneficiary Liferenter.
4. Life Interests declared Alimentary or not Assignable.

SECTION I.

Construction in Gifts to Strangers, or to Spouses and Children nominatim.

Interests in succession arising under conjunct destinations.

1102. The expressions "fee," "liferent," "conjunct," &c., when used in marriage-contracts and family settlements, have, as is well known, received an interpretation depending on the relationship of the parties and the source from which the estate is derived, and differing from the meaning which would be given to the same terms in destinations to strangers.

Import and effect of conjunct destinations to strangers.

1103. In the case of destinations to strangers, the general rule is, that an estate given simply, without reference to time, imports a fee. Accordingly, a destination to such persons in "conjunct liferent," or in "conjunct fee," imports an estate for life or in fee, as the case may be, to the institutes and the survivor of them.[1] In the case of a destination to strangers in conjunct fee and liferent, the grantees, according to Professor Bell,[2] are joint fiars during their joint lives; but the survivor enjoys his own fee of the one-half and only a liferent of the other, the fee of which descends to the heir of the predecessor. In other words, the disponees have only a right in severalty in the fee. This construction is adopted in order to give a meaning to the words "and liferent;" for if the survivor took the whole estate, the right would be indistinguishable in its properties from a joint estate in fee, and the gift of the liferent would be rendered nugatory. A destination to the parties jointly, and to the survivor and *their* heirs, imports a

[1] Stair, 2, 3, 41 and 42; Ersk. 3, 8, 35; *Bisset* v. *Walker*, 1799, M. "Deathbed," App. No. 2; and see Bell's Prin. § 1879, 5th ed. 1882.

[2] Bell's Prin. § 1709.

joint interest in the fee with the right of survivorship, and a substitution to the heirs of the survivor.

Principles of construction applicable to conjunct destinations in family provisions.

1104. Next as to destinations in marriage-contracts or family settlements, the construction of these appears to be precisely the same in the class of destinations under consideration as in those of a purely heritable character. In such settlements accordingly, a destination to a parent in liferent, and to his child or children *nominatim* in fee, receives effect according to the natural meaning of the words, whether the conveyance proceed from a stranger or from the parent himself;[1] though in the latter case, as the liferent is one by reservation, the adjection of a power of disposal is held equivalent to a reservation of a fee-simple interest during the granter's lifetime.[2] The construction is the same where the destination is to children named and to such as may be born, the fee in the children named being held sufficient to support the title of those who may come into existence.[3]

"Conjunct fee and liferent," in what cases these words vest the fee in the husband.

1105. A destination to spouses "in conjunct fee and liferent," in the general case, gives the entire fee to the husband, burdened with a liferent in favour of the wife,[4] contrary to the natural meaning of the expression, which would import a joint *pro indiviso* right to the fee, with a liferent in the survivor of the share which fell to the heirs of the other.[5] And it makes no difference in the result whether the conveyance proceeds from the husband himself, from a stranger,[6] or from the wife's father;[7] nor does the form in which the liferent interest is limited affect the construction.[8] But if the subject of the conveyance be the wife's separate estate, it is settled that a destination in "conjunct fee and liferent" does not transfer the fee to the husband; the presumption in such cases being that the granter intended to reserve the fee, and to give only a liferent interest to the surviving spouse.[9] If the property come from the wife's side of the house, and if there be a destination to her heirs or the heirs of the marriage, the husband is liferenter and the wife is fiar.[10] An interest in the fee of property conveyed by the husband or by a stranger may be conferred on the wife by

[1] *Mackintosh* v. *Mackintosh*, 28 Jan. 1812, F.C.

[2] *Cumming* v. *Adv.-General*, 1756, M. 15,854, 4268; *Baillie* v. *Clark*, 23 Feb. 1809, F.C.; *Dickson* v. *Dickson*, 7 Feb. 1780, Hailes, 865; *Stiven* v. *Brown's Trs.*, 1873, 11 Macph. 262.

[3] *Dykes* v. *Boyd*, 3 June 1813, F.C.

[4] *Wilson* v. *Glen*, 14 Dec. 1817, F.C.; *Madden* v. *Currie's Trs.*, 22 Feb. 1842, 4 D. 749.

[5] See Bell's Prin. § 1709.

[6] *Wilson* v. *Glen* and *Madden* v. *Currie's Trs.*, *supra*.

[7] *Fisher's Trs.* v. *Fisher*, 19 Nov. 1844, 7 D. 129.

[8] *Wilson* v. *Glen*, *supra*.

[9] *Cameron* v. *Young*, 28 June 1837, 15 Sh. 1205; *Murray* v. *Blair*, 4 April 1739, 1 Cr. St. & Pat. 251; *Myles* v. *Calman*, 12 Feb. 1857, 19 D. 408; over-ruling *Neilson* v. *Murray*, 1 Pat. 65.

[10] *Brough* v. *Adamson*, 1887, 14 R. 858, and cases in preceding note.

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a clause of conditional institution in favour of the survivor.[1] Where children are substituted to parents in the destination, it has been held that the word "children" may include the heir or issue of a deceased child.[2]

Conjunct liferent with destination to children *nascituri* construed as a fee to one spouse and a liferent to the other.

1106. The construction of destinations by which a joint or conjunct liferent is given to spouses (without the use of the word allenarly, or only), and a fee to children *nascituri* or not named, is precisely the same as that of destinations in conjunct fee and liferent; that is to say, a conveyance by a stranger to spouses in conjunct liferent gives the fee to the husband, unless the survivor is conditionally instituted as fiar in express terms;[3] while, on the other hand, a conveyance by either of the spouses to themselves and the longest liver in liferent, with a nominal fee to the heirs of the marriage, leaves the fee untransferred in the person of the granter.[4] In such destinations the right of either spouse may be restricted to a liferent by the use of the word allenarly, or only. It has been held that there is such an analogy between the Scottish and the English forms of destination of land to parents in liferent and the heirs of the body in fee, that an English destination comprehending lands in Scotland gives the same rights as would flow from a destination in the forms which are in use in Scotland.[5] Where such a destination is contained in a contract of marriage, or in a deed of gift in contemplation of marriage, it must be remembered that, even if the terms of the destination are such as to vest the fee in one of the parents, the rights of the issue of the marriage are so far protected that a substitution in their favour cannot be defeated by the parents' gratuitous deed.[6]

SECTION II.

Gifts to Children nascituris subject to a Liferent or Life Interest in the Parent.

Preliminary.

1107. The construction of destinations to children *nascituri* (in which category all gifts to children unnamed[7] would appear to be

[1] *Burrowes* v. *M'Farquhar's Trs.*, 6 July 1842, 4 D. 1484; *M'Gregor* v. *Forrester*, *infra*; *Scott* v. *Maxwell*, 12 D. 932; 22 June 1854, 1 Macq. 791.

[2] Sp. Ca. *Ranken*, 1870, 8 Macph. 878.

[3] *M'Gregor* v. *Forrester*, 13 April 1835, 1 S. & M'L. 441, affirming 9 Sh. 675.

[4] *Jameson* v. *Strachan*, 27 Jan. 1835, 13 Sh. 318; *Mackellar* v. *Marquis*, 4 Dec. 1840, 3 D. 172.

[5] *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, affirming 8 R. 249.

[6] *Smith Cuninghame* v. *Anstruther's Trs.*, 1869, 7 Macph. 689.

[7] *Porterfield* v. *Graham*, M. 4277; 17 March 1870, 2 Pat. 537; *Lindsay* v. *Dott*, 1807, M. "Fiar," App. No. 1; *Ralston* v. *Hamilton*, 4 Macq. 397. It does not appear from the report of the last cited case whether there were any

included) is liable to be affected by the consideration that the right cannot vest in a class of persons who are non-existent. One consequence of this doctrine is the establishment of the rule according to which, in certain cases, estate destined in general terms to children in fee is held to vest in the parent or parents in whom the estate nominally given is an estate of liferent. The construction of the word "liferent" as equivalent to "fee," where the fee is *ex figura verborum* given to children *nascituri*, was originally adopted by the Court in order to prevent the anomaly of a fee of feudal estate being kept in suspense until the birth of children.[1] Afterwards, when the intention to limit the parent's interest to an estate for life was strongly manifested, as by the use of the word "allenarly" or "only" in conjunction with "liferent use," the principle of a fiduciary fee in the liferenter for the benefit of unborn children was admitted.[2] A disposition to spouses in conjunct fee and liferent for *their* liferent use allenarly, and to the children in fee, vests a fiduciary fee in the parents and a substantial fee in the children.[3] And it has since been ruled that where a *nominatim* disponee is associated with the children in the destination, he takes the fee for behoof of himself and the children who may come into existence.[4]

Restriction to liferent use allenarly makes liferenter a fiduciary fiar.

1108. A restriction of an estate in "conjunct fee and liferent" to the liferent use allenarly of one[5] of the spouses, will in general vest the substantial fee in the other spouse. For, as the restriction to liferent use is inconsistent with the force and effect of a destination in "conjunct fee and liferent," the Courts endeavour to reconcile the expressions by supposing an intention to confer a fee on the

"Conjunct fee" not susceptible of construction limiting the right to a liferent.

children born before the date of the will, but there were children answering the designation at the death of the testator, and this circumstance was held not to affect the construction.

[1] *Frog's Crs.* v. *His Children*, 1735, M. 4262; *Lillie* v. *Riddell*, 1741, M. 4267; *Lindsay* v. *Dott*, 1807, M. "Fiar," App. No. 1 (where it was held that the circumstance that children were in existence at the execution of the deed, and that none were afterwards born, made no difference in the construction); *Dewar* v. *M'Kinnon*, 5 May 1825, 1 W. & S. 161 (where the rule was applied to a destination to the "heir-male of the marriage," under reservation of the parents' liferent, proceeding upon an obligation to dispone).

[2] *Newlands* v. *Newlands' Cr.*, 1794, M. 4289; 26 April 1798, 4 Paton, 43; *Thomson* v. *Thomson*, 14 Dec. 1812, 1 Dow, 417, and 5 Paton, 651; *Harvie* v. *Donald*, 26 May 1815, F.C.; *Allardice* v. *Allardice*, 1795, Bell's Fol. Ca. 156; *Napier* v. *Scott*, 14 Feb. 1826, 2 W. & S. 550; *Dixon* v. *Fisher*, 1 July 1833, 6 W. & S. 431. The word "alimentary" seems to be of equivalent force; *Douglas* v. *Sharpe*, 9 Mar. 1811, Hume, 173; *Kennedy* v. *Allan*, 19 Feb. 1825, 3 Sh. 554, N.E. 383; *Gerran* v. *Alexander*, 1781, M. 4402.

[3] *Watherstone* v. *Renton*, 1801, M. 4297; *Bryson* v. *Munro's Trs.*, 1893, 20 R. 986.

[4] *Martin's Trs.* v. *Milliken*, 24 Dec. 1864, 3 Macph. 326; *Macgowan* v. *Robb*, 1 Macph. 141, 2 Macph. 943.

[5] *Wilson* v. *Glen*, 14 Dec. 1819, F.C.; *Cameron* v. *Young*, 28 June 1837, 15 Sh. 1205; *Wilson* v. *Reid*, 11 Dec. 1827, 6 Sh. 198; *Forrest* v. *Forrest*, 26 May 1863, 1 Macph. 806.

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party from whom the estate has come, or on the husband *propter personæ dignitatem*, and to restrict the right of the other to a liferent use.[1] And it would seem that, even in a destination to the spouses by one of themselves "in conjunct liferent," the restrictive construction which has been put on the word "allenarly" will yield, as in the case of other liferent rights by reservation, to the presumption which a power of disposal is held to furnish of the granter's intention to retain the fee.[2]

Extension of the doctrine of fiduciary fee to pecuniary provisions.

1109. The distinction established between the words "liferent" and "liferent use only" in relation to heritable estate was ultimately extended to all family provisions by way of direct destination or bequest, irrespective of the nature of the subject of the conveyance. "The decisions of the Scotch Courts," said Lord Campbell, "make no distinction between land and money in this respect; and with regard to money, treat a disposition to the parent for life, remainder to the children *nascituri*, without the word 'allenarly,' as in effect a simple destination, which may be defeated by the parent who is considered the fiar." [3] The extension of the feudal maxim, that a fee cannot remain in suspense to destinations of personalty, was regretted by many of the eminent lawyers of the past generation; so much so, that Lord Corehouse said that the Court would decline to go further in that direction than was warranted by the exact terms of former judgments, or to extend a doctrine in itself so questionable.[4] The rule, however, is too firmly established to be displaced by any authority except an Act of Parliament.

Conditional institution is presumed in gifts in fee and liferent.

1110. The recognition of a constructive trust in the parent by the effect of the word "allenarly" explains and justifies the application of like principles of construction to gifts of land and money in fee and liferent allenarly. This principle has been so completely carried out, that even where the subject is purely heritable a destination-over is treated as a conditional institution, and not as a substitution. Hence the fee vests absolutely in the surviving children, and their heirs take precedence of the substitutes in the destination,[5] service being unnecessary (under the common law) to vest the right.[6] But if the destination be to a parent in liferent for his liferent use allenarly, and to the heirs-male of his body in

[1] Per Lord Brougham in *M'Gregor* v. *Forrester*, 13 April 1835, 1 S. & M'L. 458.

[2] *Lamington* v. *Moor*, 1675, M. 4252; *L. Tulliallan* v. *L. Clackmannan*, 1626, M. 4253; *Drumkilbo* v. *Lord Stormonth*, 1629, M. 4254; *Dickson* v. *Dickson*, 1780, M. 4269; Hailes, 865; *Porterfield* v. *Graham*, M. 4277, 17 March 1780; 2 Pat. 537.

[3] *Mackintosh* v. *Gordon*, 17 April 1845, 4 Bell, 105; see p. 119.

[4] *Mein* v. *Taylor*, 8 June 1827, 5 Sh. 780, N.E. 727.

[5] *Snell* v. *White*, 1872, 10 M. 745.

[6] *Douglas* v. *Thomson*, 1870, 8 M. 374.

fee, this is a proper heritable destination, which cannot be defeated by the joint act of the father and his eldest son and heir presumptive.[1] It would seem that even in the case of a disposition taken at the request of a purchaser to himself for liferent use allenarly, and his heirs whomsoever in fee, the purchaser is only a liferenter, and his heir-at-law is preferable to his testamentary heirs. This decision seems to carry technicality as far in the one direction as *Frog's* case did in an opposite sense, and it is to be regretted that Lord Deas' opinion in favour of the testamentary heirs did not prevail.[2]

Effect of omission to infeft children as tiars.

1111. Where a father, being infeft, conveys to himself in liferent, for his liferent use allenarly, and to his children in fee, and upon this conveyance takes infeftment in liferent only, and in the instrument of sasine no mention is made of the children's right to the fee, the lands remain attachable by the father's creditors.[3] But in a question of succession the personal right remains in the children, and may be taken up by declaratory adjudication, or, in the case of an heir, by service to the father.[4] No special title is necessary for vesting the fee of a legacy under a destination of this nature.[5]

Continuing trust equivalent to words of express restriction.

1112. Any words which make it clear that "liferent" is to be taken in its ordinary meaning will suffice to limit the right of the first taker to that of a liferenter, and to make him a trustee for his children. An "alimentary" liferent is accordingly held to be a liferent allenarly, and this construction will prevail where the will or deed provides that the estate of the liferenter shall not be affectable by his debts or deeds.[6] The efficacy of words of express trust to restore the natural meaning of the word "liferent" in wills or marriage settlements, depends upon the form in which the purpose of the trust is expressed. The interposition of a *continuing* trust in the liferenter,[7] or in trustees, is in most cases sufficient to preserve the contingent fee for unborn children, without the employment of the taxative word allenarly;[8] that is to say, where the settlement provides expressly or by implication for the retention of the liferented funds in the hands of the liferenter or of a trustee until the fee emerges; otherwise the destination

[1] *Ferguson* v. *Ferguson*, 1875, 2 R. 627.

[2] *Cumstie* v. *Cumstie's Trs.*, 1876, 3 R. 921.

[3] *Falconer* v. *Wright*, 22 Jan. 1824, 2 Sh. 633, N.E. 537; *Houlditch* v. *Spalding*, 9 June 1847, 9 D. 1204.

[4] *Dundas* v. *Dundas*, 23 Jan. 1823, 2 Sh. 145, N.E. 133.

[5] *Andrews* v. *Lawrie*, 12 Dec. 1849, 12 D. 344.

[6] Sp. Ca. *Dawson*, 1877, 4 R. 597; and see cases, p. 609, note 2.

[7] *Mein* v. *Taylor*, 23 Feb. 1830, 4 W. & S. 22; *Ross* v. *King*, 9 D. 1327.

[8] *Seton* v. *Seton's Crs.*, 1793, M. 4219; *Ramsay* v. *Beveridge*, 3 March 1854, 16 D. 764; *Watson* v. *Watson*, 8 March 1854, 16 D. 803; *Douglas* v. *Sharpe*, 9 Mar. 1811, Hume, 173; and see cases, p. 612, note 2.

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is governed by the rules of construction applicable to direct destinations.

Secus in the case of a trust to pay or convey.

1113. It is quite settled that a direction to trustees to *pay* or *convey*, during the subsistence of the marriage, to a parent in liferent and the children of the marriage in fee, is incapable of receiving effect as a trust for the children. The trustees are bound to execute a conveyance in the precise terms of the destination; and as soon as the fund has been transferred to the parent in terms of the destination, it becomes his own by virtue of the artificial rule of construction already considered.[1] A conveyance to trustees in implement of a marriage-contract obligation to *invest* money for behoof of a parent in liferent and children in fee, or *to pay over* the fund at the *dissolution of the marriage*, is to be construed according to the intention, on the principle that guides the Court in the construction of directions for the execution of entails or settlements of land.[2] In the case of a direction to pay at the dissolution of a marriage, when the beneficiaries are specifically ascertained, there does not seem to be any room for the application of the doctrine that a fee cannot remain *in pendente*.

Legacy to A. in liferent and children in fee.

1114. The distinction between a trust for immediate payment in terms of the destination and a trust to hold for the interest of unborn children is illustrated by the case of *Ferguson's Trustees* v. *Hamilton*.[3] One of the directions of the settlement was "to pay to the persons after named and described respectively the several sums after specified," at the first term after the elapse of twelve months from the testator's death. In the enumeration of beneficiaries following this direction, there occurred the following destination:—"To James Hamilton, tailor in Irvine, in liferent, and his children, equally among them, in fee, £5000. To John Hamilton, baker in Irvine, in liferent, and his children, equally among them, in fee, £20,000." As to the legacy bequeathed to the family of James Hamilton, who had no children when the succession opened, it was not doubted that this was payable directly and immediately to the father in fee. As to the other legacy, it was argued that, as John Hamilton had several children surviving the testator, the bequest to his family at least ought not to be construed on the same principles as a bequest to children *nascituri*, and reliance was placed

[1] *Hutton's Trs.* v. *Hutton*, 11 Feb. 1847, 9 D. 639; *M'Donald* v. *M'Lachlan*, 14 Jan. 1831, 9 Sh. 269; *Ferguson's Trs.* v. *Hamilton*, *infra*.

[2] *Seton* v. *Seton's Crs.*, 1793, M. 4219; *Dennistoun* v. *Dalgleish*, 23 Nov. 1838, 1 D. 69; and see *Ewan* v. *Watt*, 6 Sh. 1125; *Jameson* v. *Strachan*, 27 Jan. 1835, 13 Sh. 318; *Cameron* v. *Young*, 28 June 1837, 15 Sh. 1205; *Alexander* v. *Alexander*, 13 Dec. 1843, 12 D. 345.

[3] *Ferguson's Trs.* v. *Hamilton*, 22 D. 1442, 19 July 1862, 4 Macq. 397, *nom. Ralston* v. *Hamilton*; *Beveridge* v. *Beveridge's Trs.*, 1878, 5 R. 1116.

on the cases of *Dykes* v. *Boyd* and *Scott* v. *Napier*,[1] which established the principle that in the case of *any* of the children being mentioned *nominatim* in the settlement, their interest was sufficient to keep the fee distinct from the liferent. But it was decided that, in consequence of the direction being for an immediate payment in terms of the destination, the fee vested in the parent, and this judgment was affirmed in the House of Lords.

Implied trusts for the preservation of life-rent interests.

1115. The effect of a continuing trust in modifying the common law construction of destinations in liferent and fee was also the subject of consideration in *Ramsay* v. *Beveridge*.[2] The truster, by a deed of direct conveyance, gave all his property to his two brothers and his sister in liferent, without taxative words, and to the children of the sister procreated or to be procreated of her marriage in fee; and he also appointed the liferenters, or the survivor of them, whom failing, the fiars, to be his executors, under certain conditions and declarations which virtually raised a continuing trust in the executors. One of the declared purposes was that the annual rents and interest arising from his estate should be divided into three parts, and applied as above mentioned; provision being also made for the events of the survivance of any of the joint liferenters, for the management of the estate during the minority of the children, and, finally, for a division of the residue amongst the children, after the death of the longest liver of the liferenters. The Lord Ordinary held that, as the deed contained a direct conveyance to the disponees, without the use of words in the dispositive clause limiting their right to a fiduciary fee, they were entitled to the fee-simple estate under the terms of the destination. But the Judges of the Second Division were of opinion that the declaration of trust embodied in the conveyance must receive effect as a qualification of the general words of disposition, and that, when read in the light of the testator's intention, it imported a restriction of the interest of the disponees to a proper liferent.

Continuing trust is equivalent to the use of the word "allenarly."

1116. Referring to the terms of the declaration of trust ("that these presents are granted under the express conditions and declarations after written"), Lord Justice-Clerk Hope said that it was too clear for argument that such a clause must qualify the right given *ex figura verborum* by the preceding words of conveyance; because, had the grant even been in the form of a fee, the fiar's interest might have been modified and defined to any conceivable extent

[1] *Dykes* v. *Boyd*, 3 June 1813, F.C.; *Scott* v. *Napier*, 14 May 1829, 2 W. & S. 550; affirming 4 Sh. 454, N.E. 460. In the last-mentioned case the children were not named in the settlement; but the direction was to *hold*, not to pay.

[2] *Ramsay* v. *Beveridge*, 3 March 1854, 16 D. 764. See also the observations of Lord J.-C. Inglis in *Donaldson's Trs.* v. *Cuthbertson*, 2 Macph. 435.

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by the declaratory clause.[1] The *dictum* of Lord Cottenham in the case of *Mackintosh* v. *Gordon*,[2] to the effect that the word "allenarly" was the only expression of intention by which a trust could be created in the nominal liferenter, was thought to be inconsistent with principle and with previous authorities; and it was observed by Lord Wood, that if the word "allenarly" had sufficient force to restrict the parent's right to a liferent, it was impossible to hold that a clear declaration of intention should not have the same force, when introduced into the deed, as one of the conditions and burdens under which the conveyance was given.[3] In a case decided soon afterwards, where a residue was left to the testator's daughters under the declaration that one-half of each share was vested absolutely, the other half "being left to each of them in liferent, and to their children in fee," but not to be payable till after the death of the testator's widow and the majority of the youngest daughter, the Court again gave effect to the apparent intention, and found that it was the duty of the trustees to retain the second half of the daughters' shares for the benefit of their children; on the ground, apparently, that the direction to pay over the one-half of the provision implied that the other half was to be retained for the purpose of investment in terms of the trust.[4]

SECTION III.

Estate of a Beneficiary Liferenter.

Liferent and life interest distinguished.

1117. The incidents of the heritable estate of liferent need not be discussed in a work relating to the law of succession. But gifts of the liferent or income of a trust, or of subjects held in trust in order to secure an income for life to a beneficiary, enter into the scheme of almost every will or family settlement, and it is proposed to consider here the questions which arise as to their meaning, and the rights of beneficiaries under such gifts. A life interest under a trust may either take the form of an annuity, or of a gift of the income of a capital sum, or of residue. The first case has already been considered.[5]

Life interest carries no power of administration.

1118. The first point to be noticed is, that the right of a beneficiary liferenter does not necessarily or usually include the right of being put into the possession and administration of the trust-estate as proprietor in liferent. By a somewhat inaccurate but intelligible use of the word, a truster is often made to say that he

[1] 16 D. 771.

[2] *Mackintosh* v. *Gordon*, 1845, 4 Bell, 124.

[3] 16 D. 799.

[4] *Watson* v. *Watson*, 1854, 16 D. 803.

[5] Chapter XXXI., Section II. (Legacies and Residue).

gives a liferent to a beneficiary, when he really means to give only the income of an estate which is to be retained and administered by his trustees, and in such cases the intention will, of course, be alone considered. The distinction is very well brought out in the second branch of the case of *Ker's Trustees*.[1] After the merits of this case had been disposed of by the House of Lords, the marriage trustees of Mr. Ker made a claim in the Court of Session to a conveyance in liferent of the father's estate. The father had, in general terms, constituted his son his residuary legatee, subject to a declaration that in case his son, or other child or children, should marry, or otherwise conduct themselves so as not to merit the approbation of his trustees, "the provisions hereby made in favour of such children so marrying or acting shall only belong to them in liferent, for their liferent use allenarly, and to their issue or heirs above mentioned in fee." Before the time appointed for distribution, the trustees of the father's estate, for reasons stated in the minutes of the trust, made a declaration restricting the son's rights in the terms above quoted. It was held, reversing the decision of the Lord Ordinary, that it was implied in the statement of the trust purposes by the father that the trustees should retain the estate vested in themselves until the trust should come to an end, and that the beneficiary interests of the parties must receive effect through the trustees.[2] When it is considered that, in the case of a proper estate of liferent, the management of the liferented estate is necessarily committed to the liferenter, subject only to an appeal to the Court in cases of dilapidation or misuse of power, it may reasonably be inferred that the same reasons which induce a testator to restrict the interest of his son or residuary legatee to an income for life would also operate in the direction of depriving the beneficiary of the active powers of a liferenter. The principle of the decision in *Ker's* case is undeniably sound; and in the absence of expressions amounting to a direction to the trustees to execute a conveyance in liferent and fee, the fair presumption is that a beneficiary who is treated as the proper subject of a protected interest must be content to have his estate managed by trustees, and to receive his liferent in the shape of income of a trust-estate.

Right to income of a fund depending on other lives.

1119. Where a will is contained in different instruments, dealing with different interests carved out of a succession, a doubt may arise as to whether a beneficiary was intended to receive the income of a particular estate for life or only during a definite period, *e.g.*, while the estate remains vested in trustees. It is, of course, very unlikely that a testator should desire that the income

[1] *Ker's Trs.* v. *Justice*, 1868, 6 Macph. 627.

[2] See Lord Curriehill's opinion, 6 Macph. at 630.

which he has provided to a beneficiary should come to a premature termination, especially if the beneficiary is his child; and in all such cases the presumption is in favour of an interest for life. This presumption received effect in the last branch of the great suit regarding the will of the first Marquis of Breadalbane.[1] But the principle will not apply to a settlement in which the maker undertakes to make an annual payment during his own life; and in such a case the annuity may even continue after the death of the grantee, and be payable to his representatives.[2]

Gift of the income of an estate which includes minerals.

1120. The question what is income as distinguished from capital, arises under conditions differing in some respects from those which determine the corresponding question between a liferenter and a fiar. These questions of course have relation chiefly to mineral estates and the right of working minerals under a lease. Under our older law, as expounded by Erskine, the rule that a liferenter must use the estate *salva rei substantia* was strictly followed, and even in the case of open mines it was said that the liferenter, although entitled to continue the workings, ought not to exceed "the measure formerly accustomed by the proprietor."[3] But this restriction has been departed from, and it has also been laid down that wherever minerals are let on lease, and it is plainly the intention of the granter of a liferent that it should include the rents, the intention will be effectual.[4] Now, where a proprietor of lands containing minerals creates a trust of his estate, and gives the income or the liferent use of the estate to a beneficiary, this is equivalent to a direction to the trustees to permit the liferenter to enjoy whatever would be included in a liferent, if given directly.[5] Consequently, the beneficiary is not entitled, as an incident of the liferent use, to receive the rents payable by tenants of mines which were opened after the testator's death.[6] But also the beneficiary is entitled to the rents or royalties payable by the tenants of mines which were open at the testator's death.[7] The right may be enlarged by express provision, so as to include minerals unwrought or abandoned by the testator.[8]

Gift of income of estate by a tenant of minerals.

1121. Where the will is the testamentary act of a tenant of minerals, we enter upon a different order of ideas. The tenant's right under a lease of ordinary duration could not with propriety

[1] *Breadalbane's Trs.* v. *Jamieson*, 1873, 11 Macph. 912.

[2] *Cross* v. *Bankes*, 1886, 13 R. (H.L.) 40, reversing 11 R. 988.

[3] Ersk. 2, 9, 57.

[4] 1 Bell, Com. 7th ed. 63.

[5] *Campbell* v. *Wardlaw*, per Lord Watson, 10 R. (H.L.) 69.

[6] *Campbell* v. *Wardlaw*, 1883, 10 R. (H.L.) 65, affirming 9 R. 725.

[7] *Guild's Trs.* v. *Guild*, 1872, 10 Macph. 911; *Wardlaw* v. *Wardlaw's Trs*, 1875, 2 R. 368.

[8] *Baillie's Trs.* v. *Baillie*, 1891, 19 R. 220.

be the subject of a disposition in liferent and fee, and in such cases the question is, What did the testator understand by "income"? Two cases have occurred. In the first of these,[1] it appeared that the trustee had held two mineral leases, which at the time of his death had about five years to run. The trustees carried on the mines, and in three years realised profits amounting to £30,000, which were claimed by the testator's widow as falling within a provision to her of "the free annual income of the free residue" of the testator's estate. The decision was adverse to the claim of the widow, on the ground, as stated by the Lord President, that these leases were terminable rights, and their duration after the death of the testator was very short, and that where the *universitas* of an estate is conveyed to trustees for the purposes of ultimate realisation and conversion, the true construction is that the beneficiary liferenter is to receive the interest at a fair rate accruing upon the capital sum obtained by realisation.[2] In the second case, which came before the Second Division of the Court, and which was referred to seven judges,[3] the facts were so far different that the testator's business of coalmaster included a considerable number of leases terminating at various periods, the last of which extended to a term of fifteen years after the testator's death, and that the trustees were empowered to carry on the business without limitation as to time. The case was not distinguishable from that of a conveyance to trustees of any going business to be continued for the benefit of a liferenter of income, and the decision was in favour of the beneficiary liferentrix, Lord Rutherfurd Clark alone dissenting, on the ground that in his opinion a rule had been settled in the case of *Ferguson* which ought to be consistently followed. The writer suggested that the doctrine of the English Courts of Equity ought to be recognised, according to which, where a residue includes "wasting" or terminable interests which in a reasonable course of administration ought to be capitalised, the right of the legatee of income is a right to receive the income of the estate when realised and put into a proper state of investment; but that this principle was liable to be controlled by the terms of the will, where it appeared that the testator intended that the legatee should receive the income of the trust in its existing state of investment. This view, which would reconcile the two cases of *Ferguson* and *Strain*, derives some support from the other opinions delivered, but it cannot be stated to be the view of the Court; nor, on the other hand, can it be said that the decision in *Strain's* case establishes the right of a bene-

Whether such income ought to be capitalised.

[1] *Ferguson* v. *Ferguson*, 1877, 4 R. 532.

[2] 4 R. at 535-6.

[3] *Strain* v. *Strain*, 1893, 20 R. 1025.

ficiary liferenter in all circumstances, and irrespective of the apparent intention, to receive under the name of income the profits derivable from an expiring lease.

Life interest in lands and in a residence.

1122. With regard to ordinary heritable subjects, the right of a liferenter of income will in general be measured by that of a liferenter by direct disposition. The right vests *de die in diem*, and the income, even when payable in advance, is not to be taken as including more than would be due if made payable in the usual way.[1] A right of occupation of a residence includes, unless the contrary be expressed, a right to occupy by a tenant; and in all such matters as repairs and the incidence of taxation the rule is, that the trust is responsible as a landlord, and that the beneficiary is liable to perform tenants' obligations, and to pay the taxes incident to occupancy.[2] Casualties and duplications of a ground-annual payable at distinct periods (*e.g.*, every twenty-fifth year), belong to the fiar or to the trust-estate, as representing the reversionary interest in the succession.[3]

Liability as a contributory.

1123. There is one other incident of the estate of a liferenter which must be mentioned, though it is rather of the nature of a liability than a right. When stock of a trading company is accepted by two persons in liferent and fee respectively, both are partners, and are liable as such to be put on a list of contributories for the full sum called up.[4]

SECTION IV.

Life Interests declared Alimentary or not Assignable.

Enjoyment of an estate in fee is not restrictable.

1124. It is an elementary principle that a person who has an estate in fee, or the full beneficiary interest in such an estate, is bound to make the estate available to his creditors.[5] Allied to this principle there is, in the words of the Lord President Inglis, "a general rule, the result of a comparison of a long series of decisions of the Court, that where, by the operation of a testamentary instrument, the fee of an estate, or parts of an estate, whether heritable or moveable, has vested in a beneficiary, the Court will always if possible relieve him of any trust management that is cumbrous, unnecessary, or expensive."[6] In the case in which this observation was made, a truster bequeathed the residue of his

[1] *Wood* v. *Menzies*, 1871, 9 Macph. 775.

[2] Sp. Ca. *Clark*, 1871, 9 Macph. 435; *Rodger's Trs.* v. *Rodger*, 1875, 2 R. 294; *Kinloch's Trs.* v. *Kinloch*, 1880, 7 R. 596.

[3] *Ewing* v. *Ewing*, 1872, 10 Macph. 678.

[4] *Wishart's* case in Glasgow Bank Liquidation, 1879, 6 R. 823.

[5] See *Wright* v. *Harley*, 1847, 9 D. 1151; *Campbell* v. *Stewart*, 1848, 10 D. 1280; *Darling* v. *Mein*, 1857, 14 D. 296.

[6] 18 R. at p. 305.

estates to his sons in terms which gave a vested interest to each on his attaining the age of twenty-five years, or marrying after attaining twenty-one years of age, with the consent and approbation of his trustees, but the trustees were not empowered to divest themselves of the estate or share of residue falling to a son until he should attain the age of twenty-five. One of the sons, on attaining majority, married with the approval of his father's trustees, and it was held that the trustees were bound on his demand to denude in his favour.[1] If, therefore, a father wishes that his child's estate should be protected by a trust for a period extending beyond the years of minority, he must take care to make the son's interest something less than a full right of fee, or to provide in express terms that the son's interest shall not vest until the period appointed for payment or conveyance of the son's share.

Alimentary gift in fee not effectual.

1125. The principle is further illustrated by the cases in which testators, in giving a fee to a married beneficiary, have sought to prevent that fee from falling under the operation of a marriage-contract trust. In such cases it is now settled, after some fluctuation of judicial opinion, that if the lady has bound herself to convey to marriage trustees all estate that may be acquired during the subsistence of the marriage, the obligation takes effect upon the acquired estate, notwithstanding the testator's provision to the contrary effect.[2] And in general all attempts to restrict the enjoyment of a fee, or the power of disposition of a fiar, by calling his right alimentary, or by forbidding assignment,[3] or by directing trustees to retain the capital and to pay the annual income to the legatee,[4] will fail, if it is clear that a fee, and not a life interest, is meant to be given. It may, however, be noted that where a legacy was given to a married lady, excluding the *jus mariti*, it was the practice of the Court to direct that the exclusion should be inserted in the deed of conveyance or receipt for the legacy, so that as long as the fund was distinguishable it should be separate estate.[5]

Life interest may be given so as to be inalienable and not subject to diligence.

1126. The proper case of an alimentary provision is that of an annuity or life interest declared to be neither assignable nor subject to the diligence of creditors. According to the law of

[1] *Miller's Trs.* v. *Miller*, 1890, 18 R. 301; *Wilkie's Trs.* v. *Wight's Trs.*, 1893, 31 S.L.R. 135.

[2] *Simson's Trs.* v. *Brown*, 1890, 17 R. 581, and *Douglas' Trs.* v. *Kay's Trs.*, 1879, 7 R. 295; overruling *Thurburn's Trs.* v. *Maclaine*, 1864, 3 Macph. 134.

[3] *Allan's Trs.* v. *Allan*, 1872, 11 Macph. 216; *M'Nish* v. *Donald's Trs.*, 1879, 7 R. 96.

[4] *Jamieson* v. *Lesslie's Trs.*, 1889, 16 R. 807; *Clouston's Trs.* v. *Bulloch*, 1889, 16 R. 937.

[5] Cases of *Allan* and *M'Nish*, *supra*. The subject of protected destinations is elsewhere considered (Chapter XXXIV., Section II.).

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Scotland, a gift in such terms is effective without the aid of a resolutive clause,[1] and by custom the use of the word "alimentary" would seem to be sufficient to qualify the right.[2] It is, of course, understood that the termly payments, as they respectively vest, are liable to be attached for alimentary debts, and that in the case of insolvency the legatee may be compelled to assign to a trustee for general creditors the surplus remaining after setting apart an annual allowance sufficient for his maintenance.[3] It ought not to be considered an objection to the alimentary character of an annuity that it is payable out of capital or residue.[4] The alimentary character will not attach to the provision if it comes from the beneficiary himself, *e.g.*, in the case of an annuity under a marriage-contract out of the husband's estate, and payable in a certain event to himself.[5]

Continuing trust necessary for the protection of an alimentary annuitant.

1127. The ordinary mode of protecting an alimentary life-interest is by the interposition of a continuing trust, which is effectual in favour of the alimentary liferenter without a clause of forfeiture in case of assignment or bankruptcy. It has, however, been decided with reference to a conveyance of a liferent heritable estate that a clause of forfeiture of the grantee's liferent right in case of a sale or disposition in security is effectual according to its terms.[6] There is a clear distinction between the effect of such a qualified grant and the effect of an imperfect entail. In the former case, the forfeiture does not take effect upon any right which is already vested in the grantee. He is not obliged to surrender any rents which he has drawn prior to the attempted alienation, and the only effect of the resolutive clause is to shorten the period of enjoyment by annexing a condition to its subsistence. In the case last referred to, Lord Rutherfurd Clark observed: "I do not see why the granter of a liferent should not be entitled to fix the conditions on which it shall continue to subsist. He can undoubtedly make it terminate on the occurrence of certain events, as, for instance, on the liferenter entering into a second marriage or succeeding to a particular estate. Why shall he not be able to make it terminate on a sale?"[7] In a subsequent action regarding this same liferent interest, it was represented that the liferenter had granted a trust-deed for creditors, and that his estates had

[1] See, for example, the cases cited in the *Reliance Assurance Society, infra.*

[2] *Hughes* v. *Edwardes, infra*, and cases there cited.

[3] *Livingstone* v. *Livingstone*, 1886, 14 R. 43. Compare *Corbet* v. *Waddell*, 1879, 7 R. 200.

[4] See on this subject, *Gray* v. *Gray's Trs.*, 1877, 4 R. 378.

[5] *Harvey* v. *Ligertwood*, 1872, 10 Macph. (H.L.) 33, see p. 36. *Ker's Trs.* v. *Justice*, 1866, 5 Macph. 4, and cases there cited; *Hamilton's Trs.* v. *Hamilton*, 1879, 6 R. 1216.

[6] *Chaplin's Trs.* v. *Hoill*, 1890, 18 R. 27.

[7] 18 R. at p. 33.

afterwards been sequestrated. It was held that the trust-deed was not a contravention, and also that the trustee in bankruptcy was entitled to sell the liferent.[1]

Antenuptial contracts.

1128. It is very important, in settling the wife's estate by antenuptial contract, that the income of the estate should be declared non-assignable, for unless this is done, the lady may be persuaded to make it available as a fund of security to her husband's creditors, and may do so effectually.[2]

Imperfect alimentary trusts are effectual according to their terms.

1129. A trustee may attach such limitations as regards time and quantity of interest as he pleases to an alimentary gift; and, for example, may leave a certain part of his property to the favoured legatee in the shape of an alimentary annuity payable by trustees, and the residue absolutely;[3] or, again, the alimentary quality may be attached to a fund only during the minorities of the beneficiaries,[4] or for their respective lives, or during the lives of successive liferenters, within the limits within which liferents in succession may be lawfully constituted.[5] It has even been recognised that there may be a qualified prohibition of assignment without leaving the fund open to the diligence of creditors,—that is to say, the fund may be alimentary, and may yet be made subject to the beneficiary's testamentary disposition.[6] Where the alimentary fund is to be paid to the legatee or applied for his benefit by trustees according to their own discretion, the legatee may demand that each yearly instalment of income shall be so paid or applied within the year,[7] but is not in general entitled to demand a specific investment of a capital sum.[8]

Alimentary trusts cannot be discharged or terminated by consent.

1130. It follows, from what has been said, that any attempt to discharge an alimentary trust by the joint action of the annuitant and the beneficiaries having right to the fee must fail. In the last case in which the question was discussed, Lord Watson said: "A rule to the contrary has long been settled,[9] and was recently enforced in *White's Trustees* v. *Whyte*,[10] and *Duthie's Trustees* v. *Kinloch*.[11] In both instances the parties entitled to the fee had a vested interest, which is not the case here, and in *Duthie's Trustees* v. *Kinloch* the alimentary liferenter and the beneficial fiar were one and the same person. Yet it was held that the combined

[1] *Chaplin's Tr.* v. *Hoill*, 1891, 19 R. 237.

[2] *Reliance Assurance Society* v. *Halkett's Factor*, 1891, 18 R. 615, and opinions there delivered.

[3] *Duthie's Trs.* v. *Kinloch*, 1878, 5 R. 858; and see *Balderston* v. *Fulton*, 1857, 19 D. 293.

[4] *Auld* v. *Anderson*, 1876, 4 R. 211.

[5] Sp. Ca. *Murray's Trs.*, 1887, 15 R. 233.

[6] *Elliot* v. *Bowhill*, 1873, 11 Macph. 735.

[7] *Webster* v. *Webster's Trs.*, 1882, 10 R. 169.

[8] *Cuninghame's Trs.* v. *Duke*, 1873, 11 Macph. 543.

[9] See, for example, *Smith* v. *Campbell*, 1873, 11 Macph. 639; *Cosens* v. *Stevenson*, 1873, 11 Macph. 761.

[10] *White's Trs.* v. *Whyte*, 1877, 4 R. 786.

[11] 5 R. 858.

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action of all parties interested could not defeat the settlor's intention to make the annuitant's right alimentary, a result which could not be attained without continuing the trust." [1] A strong illustration of the application of the principle is the case where trustees, with the approval of the alimentary liferenter, invested the trust-funds in bank stock in order to increase her income, and it was held in an action at her instance that the lady had no power to sanction the investment, and that the trustees were liable to replace the money lost through the eventual insolvency of the bank.[2] But the alimentary beneficiary has the right to direct the application of the income year by year as it accrues; and therefore, if he or she direct the trustees to give the money away, a claim of repetition will not lie at the instance of executors either against the donee or the trustees.[3]

[1] *Hughes* v. *Edwardes*, 1892, 19 R. (H.L.), at p. 35.

[2] *Sanders* v. *Sanders' Trs.*, 1879, 7 R. 157.

[3] *Hewats* v. *Roberton*, 1881, 9 R. 175

CHAPTER XXXIV.

LEGACIES AND PROVISIONS SUBJECT TO DESTINATIONS.

1. Conditional Institution and Substitution under Wills and Settlements in Trust.
2. Protected Destinations under Trusts.

SECTION I.

Conditional Institution and Substitution under Wills and Settlements in Trust.

Conditional institution and substitution distinguished.

1131. A legatee is said to be conditionally instituted when a legacy is given over to him in case the right should not vest in the prior legatee; he is said to be substituted when his interest is postponed to that of the prior legatee,—*i.e.*, when it is intended that he should succeed to the interest of the prior legatee, in the event of the latter dying without altering the destination. A destination in terms sufficiently comprehensive to import a proper substitution will also import a conditional institution as the lesser right;[1] and in such a case, if the institute die without having acquired a vested interest, the person substituted is held to take the succession, not *qua* substitute, but in the character of conditional institute.[2] The present chapter is confined to the subject of destinations of moveable or mixed succession, in relation to which the principles of interpretation differ in many respects from those which have been considered in treating of substitutions in heritage.

Defeasance of substitutions.

1132. A substitution in a trust-settlement, although binding upon the trustees, is not binding on the beneficiary, if he choose to alter it, which he may do after acquiring a vested right by disposing of the estate either for onerous causes or by way of settlement, or if he has come into possession, by merely changing the securities.[3]

[1] *Sutherland* v. *Douglas' Tr.*, 29 Nov. 1865, 4 Macph. 105; *Fyffe* v. *Fyffe*, 13 July 1841, 3 D. 1205; *Aitchison* v. *Allan*, 16 Feb. 1831, 9 Sh. 454.

[2] The best illustrations are found in the questions relating to substitutions in heritage, as to which see Chapter XXIV., Section IV.; *Fogo* v. *Fogo*, 18 Aug. 1843, 2 Bell, 195, and other cases there cited.

[3] Ersk. 3, 8, 44; *Brown* v. *Coventry*, 1792, M. 14,863; Bell's Oct. Ca. 310; *Greig* v. *Johnstone*, 1 July 1833, 6 W. &

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What terms import a proper substitution in moveables.

1133. The question what terms import a substitution involves the consideration of a fundamental difference in the construction of heritable and moveable destinations. The words "whom failing," in conveyances of heritable estate, acquired at an early period a fixed signification, as denoting a proper substitution. These accordingly are the words of destination usually employed in deeds of entail and settlements of landed estates. A direction to trustees to convey lands to A., whom failing, to B., will receive the construction appropriate to the subject of disposition, precisely as in the case of a direct conveyance to the beneficiary; and this construction has been given, as in the case of *Ramsay* v. *Ramsay*,[1] to trusts directing the execution of conveyances of estate consisting chiefly of heritable property. The question of conditional institution or substitution is presented in a different and more perplexing form in such cases as the *Queen's Remembrancer* v. *Dougall*,[2] where trustees were directed to realise *moveable* estate, and to invest the proceeds in the purchase of lands or in heritable security for behoof of a beneficiary. In such cases the intention deduced from the context is the only rule of interpretation, and if it appears that the testator contemplated the execution of a deed of settlement with substitutions, the direction will be equivalent to a substitution, and will receive effect as such, in the event of the institute dying without altering the destination.[3]

Presumption adverse to substitution in conveyances of moveable interests.

1134. Again in the case of destinations of moveable or mixed succession, whether expressed in the form of a conveyance or of a direction to convey, the presumption is adverse to substitution, and in favour of conditional institution.[4] The construction is similar in the case of destinations contained in marriage-contracts,[5] where the words "whom failing" import conditional institution only.[6] It was observed by Lord Brougham, in the case of *Greig* v. *Johnston*,[7] that it could not be said "that there is any technical form of

S. 426, per Lord Brougham; *M'Dowall* v. *M'Gill*, 19 June 1817, 9 D. 1284; *Baine* v. *Craig*, 8 June 1845, 7 D. 845.

[1] 23 Nov. 1838, 1 D. 83. See also *Ogilvie* v. *Erskine*, 26 May 1837, 15 Sh. 1027; and cases in Br. Syn. p. 2328.

[2] 12 Feb. 1841, 3 D. 548.

[3] *Lawson* v. *Imrie*, 10 June 1841, 3 D. 1001.

[4] *Greig* v. *Johnston*, 1 July 1833, 6 W. & Sh. 406, affirming 9 Sh. 806, where the older cases are cited; *Christie* v. *Christie*, 1681, M. 8197; *Campbell* v. *Campbell*, 1740, M. 14,855; *Brown* v. *Coventry*, 1792, M. 14,863. See also *Tait* v. *Lady Duncan*, 11 July 1837, 15 Sh. 1273.

[5] *Henderson* v. *Hamilton*, 29 Jan. 1858, 20 D. 473. Professor Montgomerie Bell, founding upon two early cases, states that in bonds of provision to children the presumption is for substitution. The circumstance of such bonds being charged on heritable estate is favourable to that view, yet it may be doubted whether the distinction would now be admitted; 2 Lect. on Conv. p. 857, citing *Roughead* v. *Rannie*, 1794, M. 6403; *Macreadie* v. *Macfadzean*, 1752, M. 4402.

[6] *Allan* v. *Fleming*, 20 June 1845, 7 D. 908; *Henderson* v. *Hamilton*, *supra*; *Lockhart* v. *Ross*, 1 July 1814, 6 Pat. 31.

[7] 6 W. & S. 420.

expression which shall alone amount to a valid declaration of the intention of the party disposing of his property to exclude conditional institution and to provide substitution;" but the intention to substitute must be expressed either in proper technical language, or by a direction to trustees to insert a clause of substitution in the conveyances or securities of the trust-estate.

Substitutions in moveables, how constituted.

1135. In *Ogilvie* v. *Cumming* trustees were directed, after payment of debts and special provisions, to lay out and employ the residue of the estate for the use and behoof of the truster's grandson, and the heirs of his body, "in such way and manner as may seem most expedient to them, till he or they may arrive at majority, when they are to denude in his or their favours, with such conditions that they shall not dispose of the same, nor alter the succession thereof, either gratuitously or onerously, as to the said trustees may seem proper;" failing which, the residue was to go to any other son that might be born to the truster's son, and the heirs of his body; "and failing of him without lawful issue, then such residue is to pertain to the daughters of the said Thomas Cumming, equally among them," &c. By a codicil it was declared that in the event of the succession opening to heirs-female the estate should pertain solely to the eldest and her issue. The succession opened to the grandson while in minority; and he having died major without calling on the trustees to denude in his favour, his representatives claimed the succession, maintaining that the destination to heirs-female was merely a conditional institution, and was evacuated when the grandson attained majority. The decision of the House of Lords, affirming that of the Court of Session, was in favour of the eldest heir-female of the truster's son; their Lordships being of opinion that, although a vested interest undoubtedly accrued to the grandson *a morte testatoris*, there was yet an effectual substitution in favour of the said heirs-female, which had not been altered by the institute.[1] In the following cases destinations of moveable or mixed estate have received effect as substitutions. (*a*) A bequest of a sum of money under the declaration that if the institute "shall die without lawful issue, then the half of the said sum of £4000 shall return to and belong to" the residuary legatee.[2] (*b*) A universal bequest to the survivor of the spouses under a mutual testament, with a declaration that on the death of the survivor the residue should be equally divided between two legatees named.[3] (*c*) A provision in an antenuptial contract to the wife of the husband's whole

[1] *Ogilvie* v. *Cumming*, 27 Jan. 1852, 14 D. 363; affirmed 15 July 1856, 19 D. (App. Ca.) 7; see also *Robertson* v. *Robertson*, 1819, Hume, 273.

[2] *Buchanan's Trs.* v. *Dalziel's Trs.* 1868, 6 Macph. 536.

[3] Sp. Ca. *Davidson*, 1870, 8 Macph. 807.

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estate, and failing her by decease, *either before or after him*, then to his lawful children surviving at the death of the longest liver. Here the widow's disponee was preferred in competition with the husband's children by a previous marriage, because the substitution was defeasible by her voluntary act, the children not being creditors.[1] In the two preceding cases the substitutions were also defeasible. (*d*) In a case of a mutual settlement by spouses, disponing their estates to each other, with a destination-over of the wife's estate to a son, whom failing, to the wife's heirs, &c. in fee,—on the death of the son the succession was held to open to his mother's heir as substitute in the destination.[2]

Substitution may be defeated by a will or general testamentary settlement.

1136. A general testamentary settlement has the effect of evacuating a substitution of moveable or mixed estate, and this effect is attributed to a will executed before the right had vested in the institute, if the will be so expressed as to carry *acquirenda*. In the case of *Fyffe* v. *Fyffe*,[3] we have a striking example of the defeasance of a substitution by the act of the institute in this manner. A legacy was given, in the first instance, to an insane person, and in the event of his death to two persons jointly, who were intrusted with the management of the fund during his life. The institute never recovered the use of his reason; but he had made a will before he became insane, and before the legacy vested in him, and it was held that this will took effect on the estate and sufficed to defeat the substitution.

Conditional institution, how constituted.

1137. A conditional institution may be (*a*) in favour of individuals named in the will, or (*b*) of survivors, or (*c*) of heirs, executors, or other *personæ designatæ*. (*a*) Where the institution is of individuals by name, no question is likely to arise. (*b*) This case may be illustrated by *Paul* v. *Home*,[4] where a testator assigned and disponed to A. and B. "equally between them, and in the case of the death of either without heirs of his or her body to the survivor of them, my whole real and personal effects whatsoever," and this was held to be only a conditional institution. A similar decision was given regarding a destination to a testator's children "equally among them, and the lawful issue of their bodies, and failing any of them by death without lawful issue of their bodies to the survivors equally."[5] The subject of survivorship, in its various and complex relations, is reserved for separate discussion. (*c*) The

[1] *Dyer* v. *Carruthers*, 1874, 1 R. 943. Note that this decision is adverse to the doctrine of "protected succession" as developed in the cases of *Massy* and *Gibson* (*infra*, Section II.).

[2] *Watson* v. *Giffen*, 1884, 11 R. 444.

[3] *Fyffe* v. *Fyffe*, 13 July 1841, 3 D. 1205. See *contra*, *Campbell* v. *Campbell*, 17 Feb. 1743, 1 Cr. St. & P. 343.

[4] *Paul* v. *Home*, 1872, 10 Macph. 937.

[5] *Stiven* v. *Brown's Trs.*, 1873, 11 Macph. 262.

conditional institution of heirs in its general relations may here be briefly noticed, under reference to a subsequent chapter on the construction of designative destinations. A conditional institution of heirs may be made in any terms sufficiently expressive of the intention of the testator to prefer the legal representatives of the beneficiary to his own representatives, as appears from the following, among other cases, in which gifts over to heirs or representatives of legatees have received effect as conditional institutions.

Conditional institution of heirs, executors, and *personæ designatæ*.

1138. In *Inglis* v. *Miller*,[1] and *Boston* v. *Horsburgh*,[2] the destination was to "heirs, executors, or assignees;" in *Graham* v. *Hope*,[3] and *Torrie* v. *Munsie*,[4] to "heirs and assignees;" in *Suttie* v. *Suttie*,[5] to "heirs and assignees whatsoever;" and in *Lawson* v. *Stewart*,[6] to "executors or next of kin." In all these cases the destination was sustained as a conditional institution in favour of the next of kin of the beneficiary or legatee. In *Torrie's* case, where the legatee was illegitimate, the doctrine was laid down that the Crown was not comprehended in a destination to heirs, Lord Glenlee observing that the gift of bastardy was in its inception different from that of *ultimus hæres*, for that a bastard had at common law no heirs except the heirs of his body.[7] In the case of *Hunter* v. *Nisbet*,[8] two unmarried sisters executed a mutual settlement conveying their whole heritable and moveable estate to the longest liver in liferent, "and to the heirs of the longest liver in fee;" and this was followed by a destination-over to heirs of a particular class. It was held that the word "heirs" in the conditional institution must be construed *heirs of the body;* because, unless the expression were so limited, the effect of the settlement would be to let in heirs whatsoever, to the exclusion of those who were specially favoured in the subsequent destination. Again, where a truster directed the execution of a conveyance of the residue of his estate in favour of his daughter, for her liferent use allenarly, and to the heirs of her body in fee, whom failing, to charities, it was held that this was conditional institution, and that the heirs of the beneficiary had a right preferable to the claim of the charities.[9] A declaration that a legacy shall be "held and enjoyed" by the beneficiary, his heirs and assignees, will receive

[1] *Inglis* v. *Miller*, 1760, M. 8084. See also *Lyon* v. *Gray*, 1751, Elchies, "Testament," No. 11; *Innes* v. *Innes*, 1670, M. 14,880, 4272.

[2] *Boston* v. *Horsburgh*, 1781, M. 8099.

[3] *Graham* v. *Hope*, 1807, M. "Legacy," App. No. 3.

[4] *Torrie* v. *Munsie*, 31 May 1832, 10 Sh. 597.

[5] *Suttie* v. *Suttie*, 19 Jan. 1809, F.C.

[6] *Lawson* v. *Stewart*, 20 June 1827, 2 W. & S. 625.

[7] 10 Sh. 603.

[8] *Hunter* v. *Nisbet*, 14 Nov. 1839, 2 D. 16, and see *Tinnoch* v. *M'Lewnan*, 26 Nov. 1817, F.C.

[9] *Simpson's Trs.* v. *Simpson*, 1889, 17 R. 248.

effect as an implied trust for the benefit of the heirs in the event of the legatee's predecease.[1] It is doubtful whether a mere power to a legatee to distribute a fund amongst his children imports a conditional institution of the children even where there is no destination-over in the event of the failure to exercise the power.[2]

Limitation to A., his heirs or executors, in some cases construed as merely giving a vested interest to A.

1139. But a destination to a legatee and his heirs and assignees will not be construed as a conditional institution of heirs where the sense of the passage is adverse to such a construction; and in the case of a direction to trustees to convey in these terms, it is necessary to look to the context to see whether the testator meant to direct an absolute conveyance, or a conveyance to the legatee with a substitution in favour of his heirs. In the case of a direction to convey to A. *or* his heirs, the heirs are clearly instituted on the failure of A.; but a direction to convey to A. *and* his heirs and assignees (especially where the subject is heritable estate) would rather appear to point to a conveyance to A. in fee-simple, heirs being mentioned merely by way of "limitation." Such was the interpretation put upon a direction in these terms in the case of *Donald's Trustee* v. *Donald*.[3] The testator directed his trustees to allow his son J. D. the liferent use and enjoyment of certain lands, and, in the event of his having any lawful children, to dispone the same to him and his heirs; but in the event of his having no lawful children, *then to dispone the same to the testator's son W. D. and his heirs and assignees*, and that on *his* attaining the age of twenty-one years complete. W. D. died without attaining majority. It was held that the right under this bequest was made conditional on W. D. attaining twenty-one; that the heirs of W. D. were only intended to take in succession to him, and were only mentioned as persons to whom, as well as to W. D., the conveyance in favour of W. D. was to be made if the event happened on which the right to a conveyance was contingent.[4] The principle and also the grounds on which exceptions to it are admitted are explained in a lucid manner by the late Lord President in *Findlay* v. *Mackenzie*, where in special circumstances a gift to a wife, her heirs and assignees, was held to be personal to the legatee.[5]

SECTION II.

Protected Destinations under Trusts.

Contracts of marriage.

1140. A right of succession which cannot be defeated by the gratuitous act of the immediate fiar is a well-established species of

[1] *Earl of Moray* v. *Stuart*, 1782, M. 8103.

[2] *Scott* v. *Carfrae*, 1769, M. 8090.

[3] *Donald's Trs.* v. *Donald*, 26 March 1864, 2 Macph. 922. See *Paton* v. *Hamilton*, 1797, M. 11,376.

[4] 2 Macph. 925.

[5] *Findlay* v. *Mackenzie*, 1875, 2 R. 909.

right under contracts of marriage, and the reason why such rights are protected is because they depend on contract, and are governed by the rule that in resisting a claim which is founded on obligation a gratuitous alienee has no higher title than his cedent.

Protected destination under a testamentary writing.

1141. The extension of the principle of protected destination to testamentary provisions was undoubtedly a new departure in the law of Scotland. The case of *Lady Massy*,[1] albeit a decision of a Court of seven Judges, has not been received with favour in the profession; it has only been followed in one subsequent case, and the Judges have more than once refused to apply the principle in circumstances not dissimilar to those of the leading case.[2] But in the present state of the law it must be recognised that a gift to a married woman in fee, whom failing, to her issue or to the other legatees, is so far a protected destination that the institute is disabled (at least during the subsistence of the marriage) from alienating the fee by gratuitous deeds, *mortis causa* or *inter vivos*. The terms of the destination in *Lady Massy's* case were: "I appoint my trustees to pay to Isabella More Nisbet, now Lady Massy, my grandniece, and her heirs, the sum of £5000 sterling, to be settled by my said trustees on herself and her issue, with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband."

Criticism of the two decisions.

1142. Now, as the writer is not professing to offer a mere digest of decisions, he may say that in his apprehension the meaning of this bequest is perfectly clear and unambiguous. The testator begins by announcing that she is giving a benefit to Lady Massy and her heirs, and as no person can take concurrently with her heirs, successive interests are indicated. Then she directs how this is to be accomplished, viz., by a settlement on the lady and her surviving issue, with a power of disposal on failure of issue. The proper way of carrying out such a direction would seem to be by an assignment of the fund to trustees, to hold for the lady for life and her issue in fee, with a destination-over to such persons as the liferentrix might appoint, whom failing, to her own heirs. The decision, however, was that the trustees of the testatrix were to invest the fund, "and to take the securities in favour of Lady Massy in fee, exclusive of the *jus mariti* of her present or any future husband, and after her death to her children by the present and any future marriage, equally among them, also in fee, subject to the condition that the right of succession of the said children to a sum equal to the proceeds of the said legacy on the death of

[1] *Massy* v. *Scott's Trs.*, 1872, 11 Macph. 173.

[2] See, for example, *Houston* v. *Mitchell*, 1877, 5 R. 154; *Mickel's Judicial Factor* v. *Oliphant*, 1892, 20 R. 172.

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their mother shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*," with power of disposal, &c., as in the will. Now, if the word "settle" does not entitle the trustees of the will to make a settlement of the usual kind in liferent and fee, it is hard to understand how it can be taken to include a power to settle under such unusual conditions as are here quoted, and the proper alternative construction would appear to be that the fund should be secured so as to give the fee to the institute, with a simple substitution, which of course would be defeasible by the act of the institute, a power of disposal being unnecessary.[1] But in the later case of *Studd* v. *Cook*,[2] where heritable property in Scotland was settled in "tail male" on a series of heirs, the decision was that the lands were destined in liferent and fee to the persons successively named and the heirs of their bodies respectively, on the ground that this was the nearest equivalent to an English settlement in tail male. The principle of this decision is that when a settlement is made or directed so as to secure certain interests, the trustees or the Court are not restricted to follow the words of the direction, but such a settlement is to be understood as will give legal effect to the declared intention of the truster; and if this principle were applied to such a direction as was given in *Lady Massy's* case, it hardly admits of doubt that the settlement which would carry out the testator's wish would be a settlement in liferent and fee, with a power of disposal to the parent in case of failure of issue. There is a considerable body of decisions relating to legacies and shares of residue which trustees were directed to secure in such manner that the income should be enjoyed by a parent in liferent and the children in fee. These decisions are noted in treating of the powers of trustees. The present section is confined to direct destinations containing effective restrictions on the powers of the institute. This is a form of settlement which is very unusual; and it must be admitted that the effect which has been given to such restrictions on the power of voluntary disposition is scarcely consistent with the principle that a substitution to a fee is defeasible at the will of the institute.

[1] The same criticism may be applied to the decision in *Gibson's Trs.* v. *Ross*, 1877, 4 R. 1038.

[2] *Studd* v. *Cook*, 1883, 10 R. (H.L.), 53; affirming 8 R. 249.

CHAPTER XXXV.

OF SURVIVORSHIP.

1. Destination to Survivors, in what cases implied.
2. In what cases Issue take as Survivors.
3. Words of Survivorship, to what Period referable.
4. Survivorship in relation to Interests for Life.

SECTION I.

Destination to Survivors, in what cases implied.

Express and implied institution of survivors.

1143. The right of survivorship may be defined to be the conditional institution of all the individuals of a class who may survive a certain event, consequent upon the failure of those who may die before that event. Survivorship is either express or implied. Where an interest in a succession is given to certain persons and to those who shall survive at a specified period of time, the terms of the grant denote a conditional institution of the legatees surviving the specified period of vesting, and no question of construction can arise.[1] Again, where a legacy or share of succession is given to a plurality of persons collectively, without any words importing a severance of interests, each of the legatees is understood to be instituted to the entire bequest, subject only to the condition of sharing it with any of the others in whom a right may vest. Under such a form of bequest the testator is understood to mean that any of the instituted legatees should take the subject in preference to his heir-at-law.[2]

Implied survivorship only arises where the same estate is given jointly to a plurality of persons.

1144. But in order to raise the implication of survivorship, it is necessary that the same estate should be given jointly to the same legatees. This principle is well exemplified in a case[3] where a truster disponed certain estate to his nephew Dr. P. for his own use, under burden of an annuity of the interest of £2000 to a niece, adding, "in regard his (the nephew's) legal heirs are not my natural

[1] There may, however, arise a question on the terms of the deed or will, whether a testamentary destination to survivors was really intended. See *M'Millan* v. *M'Millan*, 28 Nov. 1850, 13 D. 187; *Cruickshanks* v. *Cruickshanks*, 10 Dec. 1853, 16 D. 168.

[2] *Barber* v. *Findlater*, *Tulloch* v. *Welsh*, *Breadalbane's Trs.* v. *Pringle*, and other cases cited *infra*.

[3] *Pursell* v. *Elder*, 24 March 1865, 3 Macph. (H.L.) 59.

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heirs, it is hereby provided and declared that, failing the said Dr. P. and C. P. (the niece), who are equally near to me, without leaving legitimate children by one or other of them, the property hereby conveyed to them shall devolve upon and belong to the children of my cousins-german." Here the intention to favour the families of the two individuals named is very strongly manifested in the explanatory part of the provision; yet it was held by the House of Lords that under that form of gift the niece took nothing by way of survivorship, and that on the death of the nephew the whole fund (subject to her annuity) went over to the testator's second cousins.

Clauses of survivorship primarily import conditional institution.

1145. A conditional institution by way of survivorship is understood to be operative during the whole period in which the vesting of the succession may remain in suspense, under the provisions of the will or settlement. The right of survivorship is of course indisputable when it is expressly referred to the period of distribution; and this rule applies to legacies of heritage, and provisions payable out of entailed estates, as was held in *Aitchison* v. *Allan*, where the trust-deed declared that, in the event of the death of any of the granter's children before marriage or majority, the provision should be equally divided among the surviving children. This was found to import a conditional institution in favour of the survivors to the share of a predeceasing legatee, and not merely a substitution.[1] Questions sometimes arise as to which of the objects of a destination the condition of survivorship is applicable to, of which the the case of *Chalmers* v. *Chalmers*[2] offers an illustration. A father disponed *mortis causa* four different subjects, one to each of three children by his first marriage, and the fourth to two children of the second marriage, equally between them, all in liferent, with a gift of the fee to the children of the respective liferenters. There was a general proviso, "that in the event of the decease of any of my children without lawful issue, the share or shares of such deceaser or deceasers shall accresce and belong to the survivors or survivor of them equally in liferent, and to the lawful issue *per stirpes* in fee, but without prejudice to the former destinations." On the predecease without issue of one of the two children of the second marriage, to whom one of the subjects was disponed in liferent, it was held that the survivor of these two was entitled

[1] *Aitchison* v. *Allan*, 16 Feb. 1831, 9 Sh. 454; and see *Burnett* v. *Burnett*, 4 March 1854, 16 D. 780; *Smith* v. *Smith*, 1710; *Denholm* v. *Denholm*, 1726, M. 6346. Accordingly, in the cases on survivorship, examined in a subsequent section of this chapter, which are very numerous, the only question raised was as to whether the force of the clause of survivorship extended to the period intermediate between the death of the testator and the term of distribution.

[2] *Chalmers* v. *Chalmers*, 22 May 1827, 5 Sh. 687, N.E. 641.

to the entire subject *jure accrescendi*, to the exclusion of the children of the first marriage.

Doctrine of accretion in joint destinations.

1146. The right of survivorship is implied wherever a legacy is conceived in terms which, in the contemplation of law, amount to a *joint* destination. The use of the word "jointly" implies survivorship;[1] and according to Professor Bell the addition of the word "severally" does not detract from the force of the joint bequest. Where the legacy is destined simply to two or more parties, without the addition of words importing either joinder or severance, it has been held, in conformity with the principles of the Civil Law, that the *jus accrescendi* was implied. Thus, a liferent to three daughters "during all the days of their lives respectively," was held to be total in the person of the surviving daughter; Lord Glenlee observing that the legatees were conjunct *et re et verbis*.[2] So also, in a later case, where there was a conveyance of a succession to several parties *in shares*, followed by a *simple* destination to the same parties as residuary legatees, Lord J.-C. Inglis observed that the latter destination would have the effect of preventing an intestacy in the event of the failure of any of the beneficiaries.[3]

Whether the *jus accrescendi* embraces lapsed interests in succession.

1147. It may be affirmed, on the authority of the *Breadalbane Trust* case,[4] that where a joint destination is so expressed as to imply a substitution in favour of the surviving grantee, it will also operate as a conveyance of the entire subject to any of the donees who accept, in the event of the others declining the bequest or betaking themselves to their legal rights. The principle that the testator prefers that either of the legatees should succeed rather than his heir-at-law, is applicable whether the joint destination fail through non-acceptance or through non-survivance. The case of *Duff's Trustees*[5] raised the question whether accretion would take effect under a joint bequest to societies of a particular class in certain towns, some of these towns having no organisation of the kind contemplated. It would appear that the revocation of a gift in favour of one of a body of joint legatees does not cause the revoked interest to accresce to that which is not revoked; but that the benefit accrues to the residuary legatee.[6]

Doctrine of accretion does not extend to a bequest in shares.

1148. Where a legacy is given to a plurality of persons in *shares* (whether of unequal or of equal amount), the death of any of the

[1] Stair, 3, 8, 27; Bell's Pr. § 1879.

[2] *Barber* v. *Findlater*, 6 Feb. 1835, 13 Sh. 422; *Tulloch* v. *Welsh*, 23 Nov. 1838, 1 D. 94; see *Breadalbane Trs.* v. *Lady E. Pringle*, 15 Jan. 1841, 3 D. 357, 364; *Burnett* v. *Burnett*, 4 March 1854, 16 D. 780.

[3] *Alves* v. *Alves*, 8 Nov. 1861, 23 D. 712, 716.

[4] *Breadalbane Trs.* v. *Pringle*, 15 Jan. 1841, 3 D. 357. Here the destination was held not to be joint; but the principle was recognised.

[5] *Duff's Trs.* v. *Society of Scripture Readers*, 24 D. 557, note.

[6] *Scott* v. *Scott*, 7 Feb. 1843, 5 D. 520.

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legatees in the lifetime of the testator will cause a lapse as to the share of the predeceasing legatee; for although here the legatees are *formally* conjoined, the manifest intention is to give separate legacies to each out of a common fund. It was debated amongst the authorities in the Civil Law, whether the *jus accrescendi* did not extend to legacies in which the grantees were *conjuncti verbis tantum*, as well as to the case of legatees *conjuncti re et verbis*. Vinnius was of opinion that the right of accretion had place in both cases.[1] But ultimately the more limited application of this right, as expounded by Voet,[2] was received; and this view of the case was adopted by Lord Stair in the passage referred to.[3]

What terms import a bequest of personal succession in shares.

1149. Accordingly, it may be taken that in the law of Scotland there is no right of survivorship where the bequest, although conceived in favour of a plurality of persons, is in substance a right to separate shares; as in the case of a legacy to certain persons "in equal shares," "equally and proportionally,"[4] or "equally between" the legatees;[5] or "to be equally divided" between them;[6] or "equally betwixt them, share and share alike;"[7] or in any other form denoting a severance of interests. This construction was applied to a bequest of *residue* in a case which received great consideration, and in which the nature of the interest was relied on as creating a distinction.[8] The application of the rule to residue was again raised in the case of *Paxton*,[9] but without success. It was argued before a Court of seven Judges, whose unanimous opinion was thus expressed by the Lord President Inglis:— "There is a rule of construction settled by a series of decisions beginning in the last century, and coming down to the case of *Buchanan's Trustees*[10] in 1883, to the effect that when a legacy is given to a plurality of persons named or sufficiently described for identification, 'equally among them,' or 'in equal shares,' or 'share and share alike,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the

[1] Vinn. Inst. 2, 20, 16,

[2] Voet ad Pand., 30, 1, 59 *et seq.* (De Legatis).

[3] Stair, 3, 8, 27.

[4] *Paterson* v. *Paterson*, 1741, M. 8070.

[5] *Breadalbane Trs.* v. *Pringle*, 15 Jan. 1841, 3 D. 357.

[6] *Rose* v. *Rose*, 1782, M. 8101.

[7] *Torrie* v. *Munsie*, 31 May 1832, 10 Sh. 597.

[8] *Torrie* v. *Munsie*, *supra*. The effect of words of severance may, however, be controlled by the context; and it would seem that a destination-over in certain events, adjected to a destination in favour of individuals *conjuncti verbis tantum*, is favourable to the implication of survivorship, where the event does not happen on which the survivorship is contingent. See Lord Moncreiff's note in *Tulloch* v. *Welsh*, 1 D. 97.

[9] *Paxton's Trs.* v. *Cowie*, 1886, 13 R. 1191, where all the authorities are cited and examined. See p. 1197 for the passage cited.

[10] *Buchanan's Trs.*, 1883, 20 S.L.R. 666.

legatees. The rule is applicable whether the gift is in liferent [1] or in fee to the whole equally, and whether the subject of the bequest be residue, or a sum of fixed amount, or corporeal moveables.[2]

The rule is confined to bequests to individuals by name.

1150. The operation of the rule which gives words of severance the force of an exclusion of the *jus accrescendi* appears to be confined to bequests given to individuals named or designed.[3] The cases cited in the preceding paragraph were of this description, being in all the instances bequests to persons named and designed, sometimes with and sometimes without reference to their relationship to the testator. Legacies such as are given to a class of persons designated as standing in a certain relation towards the testator (*e.g.* to "children") do not appear to fall within the rule. It is elsewhere shown that such legacies are held to be given to the members of the class answering the description at the period of the vesting of the succession ;[4] and this construction holds good whether the destination is to the legatees jointly or "equally among them." [5]

Destinations to a class accrue to the surviving members irrespective of the form of the destination.

1151. The best exposition of the doctrine of implied survivorship, in the case of legacies to a class of persons will be found in the opinions delivered in *Douglas* v. *Douglas*,[6] where it was expressly ruled that the use of words of severance in such a legacy did not prevent the right from vesting in those of the class who survived the testator ; and consequently, that no part of the legacy lapsed by reason of the non-survivance of other persons answering the designation. The testator conveyed his estates to trustees for the purpose, *inter alia*, that one-third part of the residue thereof should be received by his wife as her absolute property, and as to the other two-third parts of the residue, that this should be possessed by his wife in liferent, and after her death be paid and delivered "to my nephews and nieces, children of G. D., M. D., J. D., and A. D., equally among them, share and share alike, and their heirs, executors, and successors." The testator was survived by his

[1] *E.g.*, Sp. Ca. *Stobie's Trs.*, 1888, 15 R. 340.

[2] *E.g.*, Sp. Ca. *Wauchope*, 1882, 10 R. 441.

[3] See *Carleton* v. *Thomson*, 30 July 1867, 5 Macph. (H.L.) 157 ; Law Rep. 1 Sc. App. 241. Lord Colonsay's opinion, though not very definite, appears to support our statement of the law substantially.

[4] Chapter XLII. (Bequests to Heirs, Next of Kin, &c.)

[5] *Rutherford* v. *Turnbull*, 30 May 1821, 1 Sh. 38, N.E. 37 (legacy to children "to be equally divided") ; *Russell* v. *Russell*, 25 Feb. 1835, 13 Sh. 551 (to younger children "equally between or among them") ; *Mackenzie* v. *Dickson*, 11 March 1840, 2 D. 833 (annuity to grandchildren "equally amongst them during their respective lives") ; *Macdougall* v. *Macdougall*, 6 Feb. 1866, 4 Macph. 372 (to grandnephews "equally" in liferent, and their issue "equally" in fee). In all these cases the entire subject was held to vest in the survivors. See also *dicta* in *Scott* v. *Scott*, 5 D. 520, per Lord Moncreiff, p. 528, and per Lord J.-C. Hope, p. 529.

[6] *Douglas* v. *Douglas*, 31 March 1864, 2 Macph. 1008 ; and see *Lockwood's Trs.* v. *Falconer*, 11 July 1866, 4 Macph. 1036.

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widow, and by twenty-two nephews and nieces, children of the persons named in the will. The question was whether two nieces who survived the testator, but died before the liferentrix, took a vested interest transmissible by will. The Lord Ordinary held that they did not, and that the shares which would have fallen to them passed to their legal representatives under the subsequent destination. His Lordship's judgment, however, was recalled by the First Division of the Court, who found that the succession vested at the death of the truster in all the nephews and nieces then surviving. It is assumed in both judgments that the bequest operated in favour of those members of the class who survived the testator. Lord Kinloch observed:[1] "The bequest here made is in favour of a class, and it appears to the Lord Ordinary that the sound construction of the deed is to hold the bequest to pass to all who should be members of that class at the death of Mrs. C. D. (the liferentrix), which is the date of payment and distribution." Lord Curriehill, delivering the opinion of the Court, said:[2] "The provision is in favour of a class, which means that an equal *pro indiviso* share of the residue was provided to each individual included in that class; and the vesting of the right to such a share in each of these individuals at the death of the testator was quite consistent with their number being either diminished by deaths or increased by births before the arrival of the term of payment. In the former of these alternatives, the effect of the death of any one or more of the twenty-one nephews or nieces would only have been that the legal, testamentary, or conventional successors of each of such defuncts would take his or her one-twenty-first share. And in the latter alternative it might be a question whether any nephew or niece, born during the survivance of the widow, would have been entitled to share in the residue."

Whether *jus accrescendi* in joint bequests has the force of a substitution.

1152. The case of *Wright's Executors* v. *Robertson*[3] raises the question whether the *jus accrescendi* implied in joint bequests has the force of a substitution as well as of a conditional institution. The question is of considerable importance in practice, since, if answered in the affirmative, the result would be that even where a right of succession was held to vest in persons constituting a class *a morte testatoris*, the bequest would continue to be affected with the condition of survivorship until the money were paid or the destination lawfully evacuated. The share of a legatee dying before payment would in that view be carried by his will, if he left one; but if he died intestate, it would pass to the survivors of the class, and not to the legatee's next of kin.[4]

[1] 2 Macph. 1010, note.

[2] 2 Macph. 1014.

[3] *Wright's Exrs.* v. *Robertson*, 20 March 1855, 27 Jur. 341.

[4] In the case of marriage-contract provisions to children, where a vested interest is held to be taken at birth, a destination to survivors *necessarily* imports a substi-

SECTION II.

In what cases Issue take as Survivors.

Whether under an express institution of survivors, the issue of deceased legatees held to be instituted by implication.

1153. Under the ordinary style of a destination of personal estate to a family, provision is made for two contingencies, namely—*first*, the death of any of the children, or persons instituted, leaving issue; and *secondly*, the death of any of these persons without leaving issue. The first-mentioned contingency is usually provided for by a clause instituting issue in the place of their parents; the second contingency is the one to which a clause of survivorship is applicable, and in correctly drawn wills the shares of such of the legatees as may die without leaving issue are given to the survivors or survivor of the original legatees, and to the issue of such of the legatees as may die leaving issue, *per stirpes*. But, whether by inadvertence or design, it frequently happens that clauses of "survivorship," so called, *i.e.*, clauses intended to provide for the case of the death of an institute without leaving issue, either are altogether silent regarding the claims of the issue of other legatees, or institute only the issue of "survivors," or the issue of "predeceasers." In such cases the question arises, whether issue can be held to be included by implication in a clause of survivorship?[1] In a preceding chapter, where some general principles of con-

tution, since no other meaning can be assigned capable of satisfying the words of the provision.

[1] In the construction of destinations to survivors in English wills, the word "survivor" in certain cases has been construed as "others," so as to include the issue of predeceasing legatees, where such issue are previously instituted. The rule of construction here referred to is of a very limited and technical character. It appears to be confined in modern practice to cases where there is a gift over in the event of the failure of all the legatees *and their issue*, a limitation which is held to imply an intention that issue should take by way of survivorship in preference to the persons to whom the succession is given over. Thus in *Doe* d. *Watts* v. *Wainewright*, 5 T. R. 427, a limitation to survivors of a family of children, followed by a gift over "in case all the said children should die without issue," was held to carry a proportion of the share of a child who died without issue to the heirs of the body of a child who had previously died leaving issue; and in *Cole* v. *Sewell*, 4 D. & War. 1, issue were held by Lord St. Leonards to be comprehended in a destination to the survivors or survivor of the settlor's daughters, A, B, and C, in consequence of a subsequent limitation to the settlor's nephew "in case the said A, B, and C should happen to die without issue." Upon the authority of these and other cases, it was held by the Lords Justices that a destination to "such of my said nephews as shall survive," followed by a gift over, in case of the death of the nephews *and their issue*, to the settlor's right heirs, let in the issue along with survivors; *re Tharp*, 33 L.J. Ch. 59. But where there is no antecedent limitation to survivors, a destination to take effect on failure of the objects first named without issue does not raise by implication a gift to the issue of those who have died leaving issue; *Dowling* v. *Dowling*, Law Rep. 1 Ch. Ap. 612.

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struction are considered, the writer has given the import of the cases (almost all of recent date) in which it has been sought to extend the meaning of the words "survivors and their issue," so as to include the issue of members of the class who did not in fact survive.[1] It is proposed here to consider the more general question of the extension of the meaning of provisions of survivorship. The question is complicated by the consideration that either of the forms of conditional institution here referred to may be raised by implication, independently of the other. The conditional institution of issue may be implied from the relationship of the granter and grantees, in virtue of the *conditio si sine liberis;* the conditional institution of survivors may, as was shown in the preceding section, be implied from the form of the destination.

Four cases stated in which question of implied survivorship arises.

1154. In the circumstances to which allusion is made, the question, whether issue are entitled to take by survivorship, is presented under a variety of conditions, which, however, may be reduced to four combinations. These are—*first*, where the will does not contain clauses providing for either of the events of the failure of the legatees leaving issue, and their failure without leaving issue; *secondly*, where the will makes reference to both these contingencies, yet without completely providing for all the events; *thirdly*, where the will contains a clause substituting children to parents in general terms, without reference to the contingency of the death of other legatees without leaving issue; *fourthly*, where the will makes provision for the contingency of the death of some of the legatees by giving the succession to the survivors, but contains no expressions showing that the contingency of the death of a legatee leaving issue was present to the testator's mind.

Where will does not provide for death of legatee, either without issue or leaving issue.

1155. (1.) Where the gift is to legatees jointly, or to a class, and the will does not make provision for either of the events of the death of the legatees leaving issue, or their death without leaving issue.—In this case the claim of the issue to the parent's original share is founded on the *conditio si sine liberis decesserit*, and can only be maintained by the issue of legatees to whom the testator was *in loco parentis*.[2] The claim of the issue to take, along with the surviving original legatees, the shares of other legatees who died without leaving issue, is founded on the *jus accrescendi* implied in joint destinations. The argument is, that under the *conditio si sine liberis* the names of the issue of the deceased legatee must be read into the destination, and the destination, thus modified, must be taken to be subject to the implied condition of survivorship in relation to all the persons comprised in it. There does not seem

[1] Chapter XIX., Section III., p. 371. [2] See Chapter XXXIX.

to be any objection in principle to the combination of the two implied conditions in the manner suggested, and the right of the issue to take by survivorship in such a case is recognised in decisions, the ratio of which is not affected by the judgment in *Young* v. *Robertson*.[1]

Import of the decisions.

1156. The cases referred to are *Rattray* v. *Blair*, reported by Hume, and *Thomson* v. *Scougall*. In the former case,[2] the provision was contained in a contract of marriage, wherein the husband bound himself to invest certain sums, amounting to 6300 merks, on heritable security, and to take the securities in favour of the spouses and the longest liver in liferent, *and to the children to be procreate of the marriage in fee;* failing which, the funds were to return to the spouses, their respective heirs and assignees. Seven children were born of the marriage, whereof three survived both parents, and one left issue, three daughters, by whom an action was brought for their shares. Upon that simple form of destination it was held that the pursuers, as coming in place of the mother, had right to *a fourth part* of the 6300 merks. Had they not been entitled to the *jus accrescendi*, the grandchildren would only have taken a one-seventh share, and the three surviving children would have taken the remainder, or two-sevenths to each. In *Thomson* v. *Scougall* [3] the destination was contained in a testamentary settlement, whereby the truster, *inter alia*, provided a share of the residue of his estate to his daughter J. F. or W. and her husband in liferent, and to his trustees in fee, "as trustees for the children of the said J. F., of her present or any subsequent marriage, equally among them," whom failing, to her heirs and assignees. Here also there was no express conditional institution either of issue or of survivors. The liferentrix had four children, none of whom survived her; but she was survived by grandchildren, the issue of two of the deceased children; and under the judgment of the Court the issue were found to have right *per stirpes* to the fee of the entire fund liferented by their grandmother.

Where will refers to contingency of legatee dying without leaving issue, but does not institute issue of other legatees along with survivors.

1157. (2.) Where the will makes reference to the two contingencies of some of the legatees dying leaving issue, and others dying without leaving issue, but without expressly providing for the distribution of the succession in the double contingency.— Cases of this description are solved by the application of a general rule, which is, that as the testator has contemplated the event of the death of the legatees leaving issue, the expressed provision

[1] *Young* v. *Robertson* (*Donaldson's Trs.*), 4 Macq. 337.

[2] *Rattray* v. *Blair*, 8 Dec. 1790, Hume, 526; *Binning* v. *Binning*, 1767, M. 13,047.

[3] *Thomson* v. *Scougall*, 12 Sh. 910; 31 Aug. 1835, 2 S. & M'L. 305; *Robertson* v. *Houston*, 28 May 1858, 20 D. 989; *Neilson* v. *Baillie*, 4 June 1822, 1 Sh. 458, N.E. 427.

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excludes the implied *conditio si sine liberis*. The will, accordingly, falls to be construed according to the express terms of the destination, and where these import that the shares of legatees dying without issue are given to the survivors, the issue of other legatees can take nothing by way of survivorship, but succeed (and that only in such manner as the will directs) to the parent's original shares. There is a considerable body of authority on this point.

Cases where the issue are strangers in blood to testator, and condition *si sine* does not apply.

1158. In the case of the *Earl of Lauderdale* v. *Royle's Executors*,[1] the residue of a trust-estate was given to the truster's widow and his four natural children (so designed), in equal shares, with this declaration, "that in case of any of the said four natural children dying before receiving their share of the said John Forbes' effects hereby settled on them, the same shall be paid to their children, if they shall leave any; and failing thereof, it shall be divided equally amongst the said surviving natural children." Here there was no room for the implication of the *conditio si sine liberis*, and the Judges were clearly of opinion that, under the terms of the bequest, the issue of a legatee who failed had right to the original share only of the parent. The next case is *Greig* v. *Malcolm*,[2] where the destination was expressed to be in favour of the testator's nephews and nieces *nominatim*, "and their heirs, executors, and assignees" (words which were held to be equivalent to a substitution of issue to parents), "and failing any of them before they attain the age of twenty-one years complete, or be lawfully married, the deceased's share to fall and belong to the survivor, or equally to the survivors of them, and to the survivor's heirs, executors, or assignees in fee." The question was, whether any interest by way of survivorship accrued to the issue of a legatee who failed, either in virtue of the implied condition or under the terms of the will? The decision was in the negative; and it was observed, in the luminous note of Lord Corehouse, that the institution of the heirs of the legatees excluded the presumption upon which the condition is founded, namely, that the testator had overlooked or forgotten the contingency of the institute having children.[3]

Effect of clause giving over share of deceased original legatee to survivors, without mention of issue of non-surviving original legatees.

1159. But the form of destination which has most frequently given rise to questions as to the extent of the interest given to the issue of the original legatees, is that in which, either in the event of *the failure of issue of the original legatees*, or, in the event of the *death of any of the original legatees* WITHOUT LEAVING ISSUE, their shares are given over to survivors, without any provision being made for the contingency of the failure of others of the original

[1] *Earl of Lauderdale* v. *Royle's Exrs.*, 19 May 1830, 8 Sh. 771.

[2] *Greig* v. *Malcolm*, 5 March 1835, 13 Sh. 607.

[3] 13 Sh. 611.

legatees *leaving issue*. This form of destination has been the subject of no less than four concurring decisions of the Court of Session, the last decision having been affirmed by the House of Lords.[1] The construction established by the decisions embraces two points: first, that the restriction of the provision of survivorship to the special case of the failure of any of the original legatees *without leaving issue* is tantamount to a conditional institution of the issue of such of the original legatees as may die leaving issue to the extent of the share that was originally given to their respective parents; and secondly, that such issue are excluded from participation in the shares which become vacant by the death of any of the original legatees without leaving issue, in consequence of such shares being given over in express terms to the "survivors" of the original legatees. Lord Mackenzie's opinion in *Clelland* v. *Gray*[2] may be regarded as the leading authority; the judgment of the House of Lords in *Young* v. *Robertson* being expressly founded on the previous decisions. In later cases it has been contended, but without success, that if a clause of survivorship *precedes* the clause instituting children of predeceasing legatees, the "share" to which the children succeed ought to include everything covered by the antecedent part of the sentence, *i.e.*, what the parent takes by way of survivorship; and it may be taken that the position of the two members of the sentence is immaterial to the construction.[3] It would seem that express words or clear implication are necessary to enable children to take in the character of survivors, with a probable exception in the case of the death of all the original legatees, in which case, according to the best judicial opinions, the whole fund would become divisible amongst their descendants *per stirpes*.[4]

Issue conditionally instituted in place of their parents under a joint destination.

1160. (3.) Where to a destination to a plurality of persons there is added a clause of conditional institution of their issue expressed in general terms, and without reference to the contingency of any of the original legatees dying without leaving issue, the conditional institutes are joint legatees, and may take by way of accretion as well as under the words of the bequest. This point is illustrated by the case of *Laing's Trustees*,[5] where a residue

[1] *Clelland* v. *Gray*, 15 June 1839, 1 D. 1031; *Walker* v. *Park*, 20 Jan. 1859, 21 D. 286; *Vines* v. *Hillon*, 13 July 1860, 22 D. 1436; *Young* v. *Robertson* (*Donaldson's Trs.*), 22 D. 1527; 15 Feb. 1862, 4 Macq. 314, 337.

[2] 1 D. 1037.

[3] Compare *M'Nish* v. *Donald's Trs.* (Lord Moncreiff dissenting), 1879, 7 R. 96, with *Forrest's Trs.* v. *Rae*, *infra*, and *Henderson* v. *Henderson*, 1890, 17 R. 293; also the two cases of *White*, 1893, 20 R. 454, 460.

[4] *Forrest's Trs.* v. *Rae*, 1884, 12 R. 389, Lord Shand's opinion; *Ramsay's Trs.* v. *Ramsay*, 1876, 4 R. 243.

[5] *Laing's Trs.* v. *Sanson*, 1879, 7 R. 244. A contrary decision was given (by a majority) in the case of *Aitken's Trs.* v. *Wright*, 1871, 10 Macph. 275.

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was directed "to be divided between my surviving brother and sisters, and the lawful issue of those who may be deceased, share and share alike." Here there was no clause of survivorship, and the residue was held to be divisible *per stirpes* amongst the surviving members of the two generations of the family. In a previous case, having the same leading name,[1] the direction was "to divide and pay the free proceeds to and amongst my children; and in the event of any of my children predeceasing the said term of division, leaving lawful issue, it is my desire that such issue shall represent and be entitled to the proportion which would have been payable to their parents." On the death of the longest liver of the liferenters there were no children of the testator surviving; but one of the children had left issue, a daughter, who, in accordance with the principle stated, was found to have right to the fund. "It is impossible," said Lord Cowan, "to hold the principle (of *Young* v. *Robertson*) applicable to cases where there is no clause of survivorship, and where, as in the present deed, there is an express declaration of the extent of the interest in the succession to be taken by the issue of predeceasing children. . . . Here it is declared, 'that such issue shall represent and be entitled to the proportion which would have been payable to their parent.'"[2]

Where will provides for case of death of the primary legatees without leaving issue, but does not include heirs of other legatees.

1161. (4.) Where the will makes provision for the contingency of the death of some of the original legatees, by giving their shares to the survivors, but contains no expressions showing that the contingency of the death of other legatees leaving issue was present to the mind of the testator.—In such a case, the issue of a predeceasing legatee takes an interest in the bequest, as coming in place of the parent, in virtue of the *conditio si sine liberis*, and if there were any principle in the question, it is difficult to see why in such a case the rights of issue should be confined to the parent's original share, and should not extend to everything that the parent, if surviving, would have taken.[3] But the limitation to the parent's

[1] *Laing* v. *Barclay*, 20 July 1865, 3 Macph. 1143.

[2] 3 Macph. 1150. But see *Graham's Trs.* v. *Graham*, 1868, 6 Macph. 820, in which all distinctions seem to be rejected, and the rule laid down that in no case can issue take by accretion.

[3] On this point we shall simply cite the cases where issue were put in the same position as parents, together with the material words of the respective destinations,—*Roughead* v. *Rannie*, 1794, M. 6403: "To my said five daughters, or such of them as shall be in life, my whole heritage and moveables, at the decease of my said wife and son, and longest liver of them two, if my said son die in minority, and without lawful children" (see observations on this case per Lord Corehouse, 13 Sh. 611). *Wallace* v. *Wallace*, 1807, M. "Clause," App. No. 6: "To the children, whether male or female, of the said Alexander Wallace . . . that may be in life at the decease of the longest liver of me and my said spouse, and that equally amongst them, share and share alike"

original share suggested by the judgment in *Young* v. *Robertson* has been accepted as decisive, and it is not likely that the question will be reopened.[1]

Revocation of legacy to parent.

1162. (5.) There is one other case which has occurred, and which may recur in practice; the case where a legacy to a parent is revoked, and the benefit is given to his family. In this case the usual presumptions are reversed, and, in the absence of contrary indications, the children are held to be institutes having the same rights as the parent had to original and accruing shares.[2] In the case cited, the writer, agreeing with the view expressed by Lord Moncreiff in *M'Nish*, deprecated the extension of the artificial limitation of the rights of issue to new cases, and pointed out that the most equitable principle of construction was that according to which the subject of the bequest is treated as a single divisible fund, in which the members of the family of both generations are entitled *per stirpes* to participate.

SECTION III.

Words of Survivorship, to what Period referable.[3]

Words of survivorship generally referable to period of vesting.

1163. According to the received interpretation of destinations of personal and mixed succession, the words of destination are understood to have reference to a definite period of time, when the right is held to vest either in the original legatees, or in those who, in virtue of a provision of survivorship or destination-over, are entitled to it on the failure of the original legatees. Where a proper substitution is created, as in the case of destinations of heritable estate, a provision of survivorship may admit of an indefinite application in point of time; but in the case of ordinary trust destinations, where the right vests absolutely in the first taker, the determination of the "period of vesting," *i.e.*, the period to which

(followed by a clause of survivorship). *Thornhill* v. *Macpherson*, 20 Jan. 1841, 3 D. 394: "That the whole of my property be equally divided amongst my children, with benefit of survivorship, if any of them shall die under age, or before the security of their mother's dowry shall justify a partition. *Cattanach* v. *Birnie*, 2 July 1858, 20 D. 1206: "To pay to A, B, and C, or the survivors of them, share and share alike, one-half of the whole residue of said moveable and personal estate." . . . "To A, B, and C, and the survivors of them, and their heirs, equally among them, share and share alike, or to the survivor of them alone." See also *Tulloch* v. *Welsh*, 20 Nov. 1838, 1 D. 94.

[1] *Aitken's Trs.* v. *Wright*, 1871, 10 Macph. 275; Lord Kinloch dissented.

[2] Sp. Ca. *M'Culloch's Trs.*, 1892, 19 R. 777.

[3] Reference is made to Chapter XLIV., Section I. (Vesting under Contingent Destinations), for an account of the latest authorities on this subject. The present exposition is retained because it treats more fully of the development of this branch of the law.

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the words of survivorship relate, is obviously the key to the interpretation of the provision.

Distribution coincident with period of vesting.

1164. Where the distribution of the estate is appointed to take place at the time when the settlement comes into operation, which is generally at the death of the granter, but sometimes (as in the case of marriage-contracts) at the dissolution of the marriage, no difficulty can arise. In such a case the provision of survivorship can only be intended to provide against the death of the objects in the granter's lifetime, or during the subsistence of the marriage, as the case may be. In such cases, accordingly, the grantee surviving the event takes an immediate vested interest.

Distribution postponed during liferent or minority.

1165. Where the distribution of the succession is postponed in consequence of the estate being burdened with a liferent or other limited interest, or where the persons to whom the fee is given are in minority, so that there is another period to which the event of survivance may be referred, a question of construction is presented, in which regard must be had to various elements, and more especially to the reason of the postponement, and the terms in which the conditional institution of survivors is declared.

Words of survivorship *prima facie* referable to period of distribution.

1166. The general rule is, that words of survivorship are *prima facie* to be understood as having relation to the period of distribution, so that where a legacy is given to certain persons and the survivors or survivor of them, without reference to time, those persons only who survive the period of distribution are held to take vested interests, to the exclusion of those who survive the testator but die before the distribution. "It is," said Lord Westbury, in the leading case of *Young* v. *Robertson*,[1] "a settled rule of construction that words of survivorship occurring in a settlement (that is, in a will) should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift. That undoubtedly is the rule now finally established in this country;[2] and it has been ascertained from the authorities,

[1] *Young* v. *Robertson*, 4 Macq. 314; see the case stated *infra*, § 1173.

[2] According to the older English authorities (2 Jarman, 672 *et seq.*), the presumption was, that clauses of survivorship in wills had relation to the time of the testator's death, but the exceptions to the application of the rule became so numerous as virtually to create a presumption the other way. Finally, in the case of *Cripps* v. *Wolcott*, 4 Madd. 11 (which immediately became a leading authority), it was laid down by Sir J. Leach, V.-C., as settled law, that if a legacy were given to two or more persons, or to the survivors or survivor of them, *and there were no special intent to be found in the will*, the survivorship was to be referred to the period of division; and that where a previous life estate was given, the period of division was the death of the tenant for life. Mr. Jarman (2, p. 684) refers to this change in the law in illustration of the mode in which an established doctrine is overturned. Lord Loughborough, he observes, first departed from the rule, founding that departure upon a circumstance which furnished no real distinction, but with an anxious recognition of its authority. Sir W. Grant, probably

that the rule was established in Scotland even before it was finally recognised in this country."

Rule founded upon presumed intention.

1167. This presumption or canon of construction may be referred to the principle of presumed intention. A legacy to a class of objects vests at the death of the testator in the surviving individuals of the class, without the necessity of an express conditional institution. Where, therefore, to such a bequest there is added a destination to the survivors or survivor of the class of objects, the rule which requires that a meaning shall be found if possible for every distinct provision of the will, obliges us to look for some period to which the words of survivorship may be referred, where their operation will be different from that of the survivorship implied by law. In such cases, where a trust is to be kept up for the purpose of securing a life interest, and the division of the fee amongst the surviving legatees is postponed to the death of the liferenter, it is said, though not with strict accuracy, that the succession vests at the period of distribution. This way of stating the rule does not include the case of a sole survivor, who, according to the authorities, takes a vested interest from the time when he becomes such by the death of the last of the legatees named in conjunction with him.[1]

Application of the rule to a trust for parent in liferent and children in fee.

1168. The case to which the presumption is most constantly applied is that of a trust of residue or of specific estate for behoof of a parent in liferent (usually the truster's wife or daughter), and the children or the survivors of them in fee. In this class of cases the current of authority is uniform in the direction of the general rule. Without entering upon an enumeration of the early authorities, it may be sufficient to cite the case of *Robertson* v. *Richardson*,[2] decided in 1843, and the series of decisions following upon it, terminating with the judgment of the House of Lords in *Young* v. *Robertson*. In the first-mentioned case, where there was a residuary destination to the testator's nephews and nieces in liferent and to their children in fee, with the usual institution of issue, and in case of death without issue then to the survivors, an elaborate judgment was pronounced by Lord Medwyn, in which the principle was

disapproving of the rule as well as the distinction ingrafted upon it, applied the principle of the exception to a case not warranted by the former decision, giving to the rule only a nominal recognition (*Daniell* v. *Daniell*, 6 Ves. 297). In a subsequent case, the same eminent judge, while applying Lord Loughborough's construction to an exactly similar case, boldly denied the existence of any contrary rule of interpretation, and thus brought about the condition of the law in which his successor could declare that it was "now settled" that a legacy to survivors vests at the period of distribution.

[1] *Infra*, § 1174.

[2] *Robertson* v. *Richardson*, 6 June 1843, 5 D. 1117. See the previous cases of *Dennistoun* v. *Dalgleish*, 22 Nov. 1838, 1 D. 69, and *Clelland* v. *Gray*, 15 June 1839, 1 D. 1031.

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affirmed, that the institution of survivors had reference to the period of distribution. In the case of a trust with an ulterior destination, he observed, if there were no indication of an opposite intention, the Court would not easily allow that destination to be defeated by holding the subject of the bequest to vest. If there were no trust, the presumption against immediate vesting was weaker. A residue, he thought, would not vest so easily as a bequest or legacy, the one being a definite sum, the other being indefinite and depending upon an ultimate result; the payment of the one being *ex sua natura* immediate, whereas the other is necessarily postponed, and may easily be made contingent.[1]

Discussion of the cases.

1169. This decision was followed a few years after by a case in the First Division, in which an instructive opinion was delivered by Lord Fullerton.[2]

1170. The interpretation of the destination in *Richardson's Trustee* v. *Cope*[3] was thought to be attended with difficulty, by reason of the circumstance that the testator, after giving a liferent of residue to M. R., a married lady, and the fee to her children, A. and C., with a clause of survivorship in the event (which happened) of the death of one of them without issue, proceeded to declare that, in case the said children or the survivor of them should not have arrived at majority when the liferent expired, the trustees were only to pay them the interest during minority, with a further destination in the event of either of them dying childless during the period of nonage. The Court, by a unanimous judgment, adhered to the principle laid down in *Newton's* case, and found that "the whole residue must be paid to the survivor at the time of the death of the said M. R. (the liferentrix) in consequence of the death of C., without issue, before the term of payment.[4]

Liferent given to a plurality of persons.

1171. In several of the subsequent cases the destination was complicated by the circumstance of the liferent interest being given to a plurality of persons successively,[5] or jointly and to the longest liver. The cases of *Buchanan* v. *Downie*[6] and *Vines* v. *Hillon*[7] are examples of suspended vesting during the currency of joint liferents,—the ground of suspension being in the former case a destination-over to other legatees, and in the latter a right of survivorship. In *Robertson* v. *Houston*,[8] where the destination occurred

[1] 1 D. 1125.

[2] *Newton* v. *Thomson*, 27 Jan. 1849, 11 D. 452.

[3] *Richardson's Tr.* v. *Cope*, 8 March 1850, 12 D. 855.

[4] 12 D. 867. See also *Walker* v. *Park*, 20 Jan. 1859, 21 D. 286, where the effect of a clause of survivorship is explained by Lord Justice-Clerk Inglis (21 D. 291).

[5] *Clelland* v. *Gray*, 15 June 1839, 1 D. 1031; *Wright* v. *Fraser*, 16 Nov. 1843, 6 D. 78.

[6] *Buchanan* v. *Downie*, 12 Feb. 1830, 8 Sh. 516.

[7] *Vines* v. *Hillon*, 13 July 1860, 22 D. 1436.

[8] *Robertson* v. *Houston*, 28 May 1858, 20 D. 989.

in a marriage-contract giving the liferent to the longest liver of the spouses and the fee to the surviving children, the survivorship was held, in accordance with the general presumption, to have relation to the death of the longest liver, which, it was observed, must be the terminus in view of the testator in a deed which derived its whole operative qualities from the event of survivorship.[1]

Judgment of the House of Lords in *Young* v. *Robertson*.

1172. To this body of authority we have to add that of the judgment of the House of Lords in the leading case of *Young* v. *Robertson*.[2] In this case the testator burdened his estate with a liferent of the whole residue in favour of his widow, and the ultimate purposes of the trust were expressed in the following terms:—"I will and direct the said trustees to account for, pay, and divide, or convey . . . the whole residue and remainder of my property, subjects, means, and estate, heritable and moveable, real and personal, or proceeds thereof, after the death of the last liver of me and my said wife, equally to and among [five persons designated], equally, or share and share alike, and to their respective heirs or assignees, declaring that if any of said residuary legatees die without leaving lawful issue *before his or her share vest* in the party or parties so deceasing, the same shall belong to and be divided equally, or share and share alike, among the survivors of my said grandnephews," &c. The testator was survived by his widow; two of the residuary legatees died during the currency of her life interest; and the question was, whether any interest vested in the deceased legatees. A majority of the Judges of the Court of Session, putting a special construction upon the words printed in italics, held that the testator meant by that expression to refer the operation of the clause of survivorship to the period of the opening of the succession.

Application of the rule in this case.

1173. The view taken in the House of Lords of the construction of clauses of survivorship in relation to time is sufficiently indicated in the introductory part of Lord Westbury's opinion. After stating the general rule in the terms already quoted, his Lordship continued:—"The application of that rule would lead to this determination in two cases. If the testator gives a sum of money or the residue of his estate to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor, in that simple form of gift which is to take effect immediately on the death of the testator, the period of distribution is the period of death, and accordingly the contingency of death is to be referred to

[1] 20 D. 993, per Lord Ivory.

[2] *Young* v. *Robertson*, 14 Feb. 1812, 4 Macq. 314, reversing 22 D. 1527 (reported *nom. Donaldson's Trs.* v. *Macdougall*).

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the interval of time between the date of the will and the death of the testator. In such a case the words are construed to provide for the event of the death of any of the legatees during the lifetime of the testator. By parity of reasoning, if a testator gives a life estate in a sum of money or in the residue of his estate, and at the expiration of that life estate directs the money to be paid, or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying, without specifying the time, and directs in that event the payment or distribution to be made among the survivors, it is understood by the law that he means the contingency to extend over the whole period of time that must elapse before the payment or distribution takes place. The result therefore is that, in such a gift, the survivors are to be ascertained in like manner by a reference to the period of distribution, namely, the expiration of the life estate." [1]

Specialty where a class of beneficiaries is reduced to a sole survivor.

1174. Where the gift of the liferent lapses by the predecease of the liferenter, the fee will vest of course on the death of the testator in the surviving legatees. And where, according to the conception of the will, the vesting of the beneficiary fee is postponed to the period of distribution (by the operation of a clause of survivorship), if all the beneficiaries but one should either die or renounce the succession before the arrival of the period of distribution, the surviving beneficiary takes an immediate vested interest, because the cessation of the contingent interests which suspend the payment removes the only obstacle to the acquisition of a vested right.[2] Similarly, where the issue of such legatees as may die leaving issue are called to the succession along with the surviving original legatees, the succession will vest absolutely in such issue after the death of all the original legatees, even if the failure should occur before the arrival of the period of distribution. This is the principle of the cases of *Cattanach* v. *Thom's Executors*,[3] where the beneficiary interest in the residue of a trust-estate was held to vest in the *only child and heir* of the last surviving residuary legatee, and of *Maitland's Trustees* v. *M'Dermaid*,[4] where

[1] 4 Macq. 319.

[2] *Foulis* v. *Foulis*, 3 Feb. 1857, 19 D. 362, and cases in next note. Also *Smith* v. *Leitch*, 2 June 1826, 4 Sh. 659, N.E. 665; *Thomson* v. *Scougall*, 12 Sh. 910, 31 Aug. 1835, 2 S. & M'L. 305; *Maxwell* v. *Wylie*, 25 May 1837, 15 Sh. 1005.

[3] *Cattanach* v. *Thom's Exrs.*, 2 July 1858, 20 D. 1206 (1st point).

[4] *Maitland's Trs.* v. *M'Dermaid*, 15 March 1861, 23 D. 732. The English decisions appear to lead to the same result. In *White* v. *Baker*, where there was a gift to A. for life, and after the death of A. to B. and C. equally, and if either B. or C. should die in the lifetime of A., the whole to the survivor, and both the joint legatees died in the lifetime of A., the question was, whether the survivor took a vested interest, or if it was necessary to his success that he should have survived the tenant for life? In respect of the importance of the question, the case was argued before the full

the residuary estate was held to vest in the *testamentary heir* of the last surviving legatee—the heir of the last survivor in both cases having died in minority, before the arrival of the period of distribution. Where a joint interest in a legacy or residuary bequest, which is subject to a liferent, comes to vest in the last surviving legatee, it would seem that the trustees are bound, if the liferenter tender a discharge of his interest, to denude in favour of the fiar.[1] This conclusion is not affected by the judgment of the House of Lords in the case of *Muirhead*,[2] because it was there recognised that, in all questions of anticipating the prescribed period of distribution, the criterion of right was that the person demanding payment should be able to show that their interests in the estate were vested.

Where fee devolves to last survivor, trustee bound to denude on the joint discharge of fiar and liferenter.

1175. The rule that survivorship has relation to the period of distribution applies only to the institution of survivors by express destination, and not to the survivorship implied by the law in legacies to a class of objects. The principle of the doctrine of implied survivorship is, that a testator, when he gives a specific subject or a sum of money to several persons jointly, or under a collective designation, gives the whole to each of the legatees subject only to the interest of the others, his intention being that any one of them should take the subject rather than his heirs-at-law. The condition of survivorship being implied only for the purpose of avoiding a lapse in the case of any of the legatees dying before the legacy has vested, the implication ceases at the earliest period at which the legacy can vest, namely, at the death of the testator.

Rule that survivorship has relation to distribution does not apply to bequests to a class of objects.

1176. The decided cases offer many illustrations of this proposition; it is only necessary to refer to some of the more recent. In the important case of *Douglas' Trustees* v. *Douglas*,[3] where the testator provided, as to two-thirds of the residue of his estate, that it should be held by trustees for behoof of his wife in liferent, and after her decease for payment and delivery thereof to his nephews and nieces, children of A. B., C. D., &c., equally among them, share and share alike, and their heirs, executors, and successors, it was held that the nephews and nieces surviving the testator took a vested interest. Lord Curriehill, delivering the

Distinction between express and implied survivorship.

Court of Appeal, and the three Judges, while acknowledging the general rule which refers the vesting of the estate to the period of distribution, were of opinion that, in the event which occurred, the legacy vested in the longest liver of the two legatees, notwithstanding that he predeceased the tenant for life (29 L.J. Ch. 577).

[1] *Foulis* v. *Foulis, supra; Pretty* v. *Newbigging*, 1 March 1854, 16 D. 667.

[2] *Muirhead* v. *Muirhead*, 12 May 1890, 17 R. (H.L.) 45.

[3] *Douglas' Trs.* v. *Douglas*, 31 March 1864, 2 Macph. 1008; and see observations per Lord Corehouse in *Forbes* v. *Luckie*, 16 Sh. 378.

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opinion of the Court, said there was here an absence of the usual indications of an intention to suspend vesting to the date of payment. "In the first place, the survivance of the term of payment is not an express condition of this provision. The provision is granted to the nephews and nieces without qualification, and not to them and the survivors of them. In this respect this case is distinguished from the case of *Donaldson*,[1] where the difficulty was, whether a certain clause in the deed in question did or did not import a condition of survivorship."[2] It should be mentioned that there was an exception from the destination of personal estate applicable to the person who should succeed to the testator's heritable estate; but their Lordships were of opinion that this was a resolutive condition, importing merely a liability to be divested upon the occurrence of the contingency.[3]

1177. In *Romanes* v. *Riddell*,[4] where the destination was in a contract of marriage, a joint liferent was given to the spouses, and the fee was destined "to the child or children of the marriage, in such proportions, if more than one child, as the father and mother, or the survivor of them, may direct;" it was held that the provision vested at the dissolution of the marriage. And where, in a mutual testamentary settlement, a legacy of £6000 was given, after the death of the longest liver, to one person in liferent, and after the death of the liferenter to another legatee, "whom failing, to his children equally between them, share and share alike," and the father of these children died before the trust came into operation, his children were held to have taken a vested interest at the death of the longest liver of the testators.[5]

Presumption that words of survivorship refer to period of distribution overcome by evidence of contrary intention.

1178. The presumption that a bequest containing an institution of survivors vests at the period of distribution is only conclusive in cases where, in the language of Sir J. Leach, "there is no special intent to be found in the will,"[6] or, as Lord Westbury puts it, where the provision of survivorship is made without specifying the

[1] 4 Macq. 337.

[2] 2 Macph. 1013.

[3] 2 Macph. 1014.

[4] *Romanes* v. *Riddell*, 13 Jan. 1865, 3 Macph. 348.

[5] *Lockwood's Trs.* v. *Keith Falconer*, 11 July 1866, 4 Macph. 1036. A similar decision was given in *Leighton* v. *Leighton*, 8 March 1867, 5 Macph. 561, where the residue was given to the truster's three sons without words of survivorship, but with a declaration that the shares should not vest until actually paid. In *Balfour* v. *Balfour*, 20 Jan. 1864, 2 Macph. 467, a destination-over to collateral relatives was held only to suspend the payment, but not the acquisition of a vested interest. In *Scott* v. *Scott*, 14 Aug. 1850, 7 Bell, 143, a destination to relatives nominated designatively, but without mention of survivorship, was held to vest the succession in those of the class who survived the period of distribution, in respect of express words importing that the objects should be ascertained at that time.

[6] *Cripps* v. *Wolcott*, 4 Madd. 11, cited *supra*, § 1166, note 2.

time.[1] The presumption therefore is overcome if the will contains either a specification of a definite time when the provision of survivorship shall take effect, or a declaration of purposes inconsistent with the supposition of vesting at the period of distribution. It only remains that we should briefly indicate the recognised exceptions to the operation of the presumption.

Where period of survivorship fixed by the terms of the will.

1179. (1.) Where the condition of survivance has relation by the terms of the clause to a specified time. As, for example, in *Rogerson's Trustees* v. *Rogerson*,[2] where trustees were directed to hold a fund for behoof of the husband and wife in certain events, and *upon the decease of both spouses* the money was to be paid to the child or children of the marriage, and if there should be more than one such child, "to be divided in equal proportions amongst the children surviving at *the time*." And again, in *Mitchell* v. *Mitchell*,[3] where a liferent was given to the testator's grandchildren and the survivors of them, and it was provided that "*upon the death of the said grandchildren . . . the fee and full right* of the capital fund or stock of my said estates *shall pertain and belong* to the lawful children of their bodies." In such cases the period of vesting is pointed out by the settlement itself, and the presumption is therefore excluded. So, where a testator, having appointed a definite period of vesting in relation to one part of his estate, proceeds to dispose of another part of it to the survivors of a class of objects, without special reference to time, it may legitimately be inferred, in the absence of distinguishing circumstances, that the condition of survivorship has relation to the time appointed in the previous part of the destination.[4] On this principle, a reversionary interest given by a testator to his nephew "in case of his survivance of me," failing whom, to other heirs, was held to vest in the nephew *a morte testatoris*.[5] After stating the import of the presumption established in the case of *Donaldson's Trustees*, it was observed—"But, giving full effect to this presumption, we must also take into account the rest of the deed before we can get all the elements for judging of the intention of the testator, which no mere general principle is to be allowed to overrule. The truster says that the estate shall go to A. F. 'in case of his survivance of me.' This, taken by itself, imports that if A. F. survived the truster, the estate was to vest in him, although he was not to come into the beneficial enjoyment till the death of the widow."[6]

[1] *Young* v. *Robertson*, 4 Macq. 319 20.

[2] *Rogerson's Trs.* v. *Rogerson*, 10 March 1865, 3 Macph. 684.

[3] *Mitchell* v. *Mitchell*, 17 March 1865, 3 Macph. 721.

[4] See Lord Kinloch's observations in *Laing* v. *Barclay*, 20 July 1865, 3 Macph. 1143, 1146, in the passage comparing the fifth and sixth purposes of the trust.

[5] *Campbell* v. *Campbell's Trs.*, 21 Dec. 1866, 5 Macph. 206.

[6] 5 Macph. 211, per Lord Deas. In

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Where object of the postponement of distribution is to secure payment of annuities.

1180. (2.) Where the distribution of the succession is postponed merely for the purpose of providing for the payment of an annuity or annuities, the presumption against vesting is very much weakened. Although in special cases the condition of survivorship has been held to have relation to the period of the death of the annuitant,[1] yet slight indications of a contrary intention will be sufficient to vest the beneficiary fee at the period of the testator's death,[2] and, in general, the presumption would appear to be in favour of vesting at the earliest possible period.[3] In a case of this description it was observed by Lord Cranworth that it would require much stronger language to satisfy the Court that there was an intention to suspend in the case of an annuity than in that of a liferent.[4]

Where object of postponement is merely the protection of the interest of minor legatees.

1181. (3.) Where the distribution of the estate is postponed merely for the protection of the interests of the legatees, as in the case of a fund destined to minor children and the survivors of them, payable to the legatees on their respectively attaining majority or being married, the more reasonable construction would seem to be that which would vest the succession at the death of the testator. If the question is to be determined by precedent, it is necessary to leave out of view the cases in which the ultimate destination is preceded by a grant of a liferent interest, that element being sufficient in itself to raise a presumption for postponement of vesting. Again, where the profits of the estate accruing during the minorities of the children are either undisposed of, or are subject to accumulation for the benefit of the surviving children, or are applicable to other purposes, the gift of the reversionary estate is in substance as well as in form a legacy payable on an uncertain event; the maxim *dies incertus pro conditione habetur* is applicable, and the right does not vest until the condition is purified. But where the income of the estate is applied by the will to the maintenance of the children during the period of nonage, the right does not appear to be dependent, in any fair view of its nature, upon the contin-

several of the English cases, the provision of survivorship has been referred to some other period than that of the distribution of the estate, as in *Weedon* v. *Fell*, 2 Atk. 123, where a legacy was given to the wife for life, and to the children and the survivors in fee, and the testator added that his intent was, that if any of the children *should die before twenty-one or days of marriage*, his share should be divided amongst the survivors; and in *Evans* v. *Evans*, 25 Beav. 81, where the survivorship was referred to by Lord Romilly, M.R., to the period of the testator's death, in respect of the terms of a *destination-over* which was so framed as to be applicable to that period.

[1] *Pearson* v. *Casamaijor*, 15 Sh. 275; 18 July 1839, M'L. & Rob. 685, 687; *Johnston* v. *Johnston*, 9 June 1840, 2 D. 1038.

[2] *Watson* v. *Macdougall*, 4 June 1856, 18 D. 971.

[3] *Pursell* v. *Newbigging*, 10 May 1855, 2 Macq. 273.

[4] 2 Macq. 276.

gency of the attainment of majority. There is not much authority in reference to this form of destination, but the point appears to be so ruled in the case of *Maitland's Trustees* v. *M'Dermaid*.[1] In this case an interest in a residuary estate given in the terms under consideration was held to have vested in the longest liver of three children, who all died in minority, though whether the two-thirds primarily destined to the others vested in him by survivorship or as next of kin of his deceased brothers was not expressly determined. The Lord Justice-Clerk Inglis observed that he could conceive no stronger character of a gift of residue than that the testator should wish his trustees to hold it for behoof of his children, and to pay out of it such sums as should be necessary for their maintenance and upbringing,[2] and there are other passages in the opinions of the Judges favourable to the supposition of immediate vesting. Some of the later cases exhibit a leaning on the part of the Court to this construction, without affirming it as matter of positive decision.[3]

Presumption for immediate vesting is stronger in case of marriage-contract, than in testamentary provisions.

1182. (4.) The presumption is much stronger in favour of vesting in the case of provisions to children in marriage-contracts than in that of testamentary bequests. Such provisions are most usually declared to be given in satisfaction of legitim, and have therefore some of the qualities of obligations. From the same circumstance it is natural to infer that the intention is to give a vested interest at the time when the right to legitim would accrue. Accordingly, it appears to be settled by the more recent decisions that marriage-contract provisions, even when not secured by a fund set apart in the father's lifetime, vest at the dissolution of the marriage, or at all events at the death of the father, which accordingly is to be treated as the period to which the provision of survivorship refers.[4] Where a preferential right is constituted in favour of children by the conveyance of a fund to trustees in the parent's lifetime, the children are held to take vested interests at birth, subject to increase or diminution by the coming into existence of other objects of the provision, or their removal by death during the subsistence of the marriage.[5] Reference is made to subsequent chapters for a fuller exposition of this subject.[6]

[1] *Maitland's Trs.* v. *M'Dermaid*, 15 March 1861, 23 D. 732.

[2] 23 D. 737.

[3] *Scott's Trs.* v. *Stack*, 16 June 1865, 3 Macph. 950; *Leighton* v. *Leighton*, 8 March 1867, 5 Macph. 561.

[4] *Romanes* v. *Riddell*, 13 Jan. 1865, 3 Macph. 348; *Rogerson's Trs.* v. *Rogerson*, 10 March 1865, 3 Macph. 684; *Vines* v. *Hillon*, 13 July 1860, 22 D. 1436.

[5] *Beattie's Trs.* v. *Cooper's Trs.*, 14 Feb. 1862, 24 D. 535; *Hunter's Trs.* v. *Carleton*, 11 Feb. 1865, 3 Macph. 514.

[6] Chapters XLIII. to XLVI.

SECTION IV.

Survivorship in Relation to Interests for Life.

Implied survivorship in joint liferent bequests.

1183. Where estate is granted to a plurality of persons in terms which import a joint destination, a right of survivorship is held to be implied in the grant, provided that the fee of the estate is given over as an entire subject; but where the subject of disposition is given to a class of persons in liferent, with remainder to their respective issue in fee, the scheme of the bequest evidently implies that life interests are to be taken by the grantees in distinct shares, and that their issue are to come into possession of their respective interests in the property on the death of the parents.[1] Again, where estate is disponed or bequeathed to a plurality of persons in shares, or in severalty, the deed or will, according to established rules of construction, only vests a *pro indiviso* life interest in the subject in each person, terminable at his death. In the case of *Tulloch* v. *Welsh*, the question was as to the effect of a disposition to a brother and a sister in liferent, for their liferent use only, with a destination-over in fee, and with this declaration, that the yearly rents and profits of the estate should be paid to the liferenters during their lives, share and share alike. It was held that a right of survivorship was given by implication, in respect of expressions in the destination of the fee, showing that the fee was not intended to open until the death of the longest liver of the liferenters.[2] It is unnecessary to enter more minutely into this branch of the general subject, because the case of *Paxton's Trustees*[3] has settled decisively that all the rules and distinctions which exist with respect to survivorship amongst fiars are applicable, *mutatis mutandis*, to liferents, and interests for life under trusts. The cases relating to the vesting of postponed interests offer many examples of the limitation of successive liferents, and also of the constitution of joint liferents with rights of survivorship.[4]

Whether a deferred liferenter takes an

1184. In the case of *Scott* v. *Scoales*,[5] a question of survivorship is presented as to the effect of an alteration of a destination in a

[1] *Donaldson's Trs.* v. *Cuthbertson*, 12 Jan. 1864, 2 Macph. 428; *nom. Macdougall* v. *Macdougall*, 6 Feb. 1866, 4 Macph. 372; see judgment in H.L. 26 March 1868.

[2] *Tulloch* v. *Welsh*, 23 Nov. 1838, 1 D. 94; and see *Maxwell* v. *Wylie*, 25 May 1837, 15 Sh. 1005; *Johnston* v. *Johnston*, 9 June 1740, 2 D. 1038.

[3] *Paxton's Trs.* v. *Cowie* (Court of seven Judges), 1886, 13 R. 1191; Special Case *Stobie's Trs.*, 1888, 15 R. 340. Compare *Muir's Trs.* v. *Muir*, 1889, 16 R. 954.

[4] *Johnston* v. *Johnston*, 9 June 1840, 2 D. 1038; *Maxwell* v. *Wylie*, 25 May 1837, 15 Sh. 1005; *Pursell* v. *Newbigging*, 15 D. 489, 10 May 1855, 2 Macq. 273; *Robertson* v. *Houston*, 28 May 1858, 20 D. 989; *Richardson* v. *Macdougall*, 1868, 6 Macph. (H.L.) 18.

[5] *Scott* v. *Scoales*, 20 July 1865, 3 Macph. 1130.

will. The testatrix, by one of her testamentary writings, provided a sum of money to a legatee, A., in liferent, and after the death of A. to her daughter B., also in liferent. By a subsequent testamentary writing she revoked the bequest in favour of A., but said nothing regarding the deferred liferent given to the daughter. The question was as to the destination of the income of the fund during the lifetime of A., whether it devolved to B., or fell into residue. It was held that B. took an immediate liferent, the judgment being put upon the special circumstances of the case.[1]

Immediate interest in consequence of the revocation of the antecedent liferent gift.

1185. Where a usufructuary interest is given to one person for the life of another person, or until the occurrence of a specified event, it has been held that the interest vests in its entirety *a morte testatoris*, insomuch that if the legatee die before the event happens, his representatives are entitled to the income for the remainder of the term.[2]

Vesting of interests given for the life of another.

[1] Where liferents are given to two legatees in succession, and the legatee first instituted predeceases the testator, it has been held in England, in conformity with the principle stated in the text, that the second liferenter takes an immediate vested interest; *re Betty Smith's Trusts*, Law Rep. 1 Eq. Ca. 79.

[2] *Hill* v. *Hill's Tutors*, 8 Nov. 1866, 5 Macph. 12.

CHAPTER XXXVI.

MATRIMONIAL PROVISIONS TO SPOUSES AND CHILDREN.

1. Form and Onerosity of Marriage-Contract Provisions.
2. Postnuptial Provisions.
3. Marriage Provisions, how secured. (Obligation, Destination, Trust.)

Division of the subject.

1186. Marriage-contract provisions[1] may be distinguished according to the person by or to whom the obligation is granted; according to the form and subject of the provision; and according to the legal character of the beneficiary's interest in it. For the purposes of our inquiry, it is sufficient to consider, *first*, the different species of marriage-contract provisions; *secondly*, the case of postnuptial provisions; and *thirdly*, the different modes of constituting marriage provisions so as to secure either a *jus crediti* available in bankruptcy, or a *preferential right* to the subject of the provision.

SECTION I.

Form and Onerosity of Marriage-Contract Provisions.

Provision by way of obligation to pay money.

1187. The simplest form of provision is that of a money obligation, *e.g.*, for the payment of a sum of money or a liferent annuity at the dissolution of the marriage, or at such time as may be agreed on. Money provisions to wives are usually, though not invariably, given in the form of an annuity. Provisions to children are usually made payable through the intervention of trustees, to whom powers are sometimes given of restricting the interest of any of the children to a liferent for necessary causes, and of settling the provisions of daughters to their separate use by marriage-contract. A power of division is usually reserved to the father, sometimes to

[1] The question, how far and in what cases marriage-contract provisions are *contractual or revocable*, is considered under the head of Revocation (Chapter XXII., Section III.). On the subject of this chapter, and more especially for the older authorities, a general reference is made to Lord Fraser on the Law of Husband and Wife, where the subject of marriage provisions is treated with greater fulness than is possible in a work which merely touches the marriage laws in relation to property. The subject of the effect of divorce on the property of the spouses is not included in this book. An excellent statement of the cases, with a discussion of their principles, by Mr. W. C. Smith, Advocate, will be found in the *Juridical Review* for January 1894.

both parents; and the legal claims of the widow and children are discharged.

Form and destination of pecuniary provisions in favour of the children of the marriage.

1188. (1.) Provisions to sons are usually made payable on their attaining majority, and after the death of the father; sometimes at majority, without reference to the father's death; or at the dissolution of the marriage.[1] Money provisions to daughters are either in the form of an obligation to pay a fixed sum—the period of payment in their case being majority or marriage, whichever shall first happen—or in the form of a sum to be liferented by the daughter, with a destination of the fee to her children, whom failing, to the surviving brothers and sisters and their issue. Three principal forms of destination may be distinguished: (1) where the intention is to give the children a vested interest in the capital upon majority or marriage, although the parent may then be alive, payment being postponed until his death; (2) to give to each child an interest which only vests upon majority or marriage, and after the parent's death; and (3) to give to the children a life interest in the proceeds of the estate, and the fee to their respective heirs; the vesting of the fee of each share being in this case postponed until the expiration of the liferent.

Destination to wife in liferent, and children in fee.

1189. The presumption for vesting is stronger in the case of marriage-contract provisions than under testamentary settlements, because the provisions come in place of legal rights. As the ascertainment of the term of vesting is governed in a great measure by fixed rules of construction, depending on the form of the destination, care should be taken, if any variation from the ordinary forms is introduced into the settlement, to state explicitly whether the children are or are not to have the right of disposing of their shares by anticipation; and if so, at what period a vested interest in the estate is intended to be given.

Widows' annuities: at what period payable.

1190. In the case of annuities to wives, the presumption, in the absence of express stipulation, is that the half-yearly payments are to be made in advance, the widow being entitled *ex lege* to an allowance for mournings, and to interim aliment for the period preceding the first termly payment of her annuity.[2] There is no reason for interfering conventionally with the rule according to which widows' annuities are payable in advance; and unless a stipulation to the contrary were framed in direct terms, the Court would apply the ordinary rule.[3] It is usual in modern contracts to name a sum in

[1] As to the effect of an obligation to pay at the majority or marriage of the child, or at the dissolution of the parent's marriage, in conferring a *jus crediti*, see Section III., *infra*.

[2] Ersk. 1, 6, 41; 2, 9, 67; and see *Palmer* v. *Sinclair*, 27 June 1811, F.C.; *Alexander* v. *Alexander*, 26 Feb. 1830, 8 Sh. 602; *Kermack* v. *Storie*, 1 July 1831, 9 Sh. 860.

[3] *Rennie* v. *Walker*, 1800, M. "Presumption," App. No. 4. As to the right

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lieu of aliment and mournings. Where the rents of specific subjects are left to a widow in place of an annuity, she is not obliged to share the first term's rent with her husband's executors (under the Apportionment Act), because her income is derived from the same source as theirs, and the testator is entitled to exclude his executors.[1]

Provisions charged on rents of heritable estate: form and effect of such provisions.

1191. Money provisions by landed proprietors are usually, though not always, made chargeable upon or payable out of the rents of the heritable estate. Although practically the beneficiaries under this form of provision have a better security for the payment of their provisions than in the case of a simple obligation by a person whose capital is embarked in trade, yet in point of law their interest is the same. In both cases the free estate of the husband or father is liable in payment of the provisions; in neither case does the obligation confer a preference, unless the party divests himself of a portion of his estate to create a security for the obligation.[2]

Conditions affecting the amount of money provisions.

1192. Money provisions to children, whether payable in the first instance out of the personal estate or out of land, may be made to vary in amount, according to circumstances. A common stipulation is, that a certain sum shall be payable if there is only one child; so much if there are two; and a certain larger sum for any greater number; subject, in the event of there being more than one child, to a power of division by the parents or the survivors of them. In the case of provisions to the younger children of landed proprietors, the failure of heirs-male may be taken into view as a ground for increasing the amount of the provisions to daughters. A provision granted to daughters, failing heirs-male of the marriage, is exigible where a son is born who predeceases his father.[3] Proprietors of estates held on imperfect entails are, since the passing of the Entail Amendment Act, no longer bound by substitutions in favour of heirs-male, and may therefore settle their estates on daughters failing male issue of the marriage. In such cases there is the less reason for the introduction of fluctuating provisions into marriage-contracts.

Influence of the law of entail.

Exclusion of right of child succeeding to other estate.

1193. In settling the terms of a provision to younger children, care ought to be taken to exclude a younger child succeeding to the estate by survivance from the benefit of the fund. In *Cruick-*

of the widow's representatives to a proportion of the last term's annuity, see *Colebrooke* v. *Gibson-Craig*, 14 May 1835, 13 Sh. 756.

[1] *Thomson* v. *Douglas*, 15 July 1856, 18 D. 1240. As to the *liability* for a widow's annuity, in a question between the representative of an heir of entail who dies during her lifetime and his successor in the estate, see *Paul* v. *Anstruther*, 1 Macph. 14, 15 Feb. 1864, 2 Macph. (H.L.) 1.

[2] Section III., *infra*.

[3] Ersk. 3, 8, 38.

shanks' Trustees v. *Cruickshanks*,[1] where the whole rents of an estate were appropriated as a fund of division for younger children, on the narrative that the eldest son was otherwise provided for, and the father obliged himself to secure a provision to the eldest son equal to that of his younger children, in the event of that son being deprived of the inheritance of another estate, it was held, upon the occurrence of the event contemplated, that the heir had no right to a share of the heritable fund provided to the other children, but that his claim was against the surplus estate.

Obligation to provide for children out of future inheritance.

1194. Sometimes an heir apparent or expectant of heritable property undertakes an obligation in a contract of marriage conditionally in the event of his succeeding to the estate. It would seem, notwithstanding the 8th section of 11 and 12 Vict., cap. 36, that such an obligation does not confer such a *jus quæsitum* on the children as would prevent the father from afterwards consenting to a disentail.[2] In one case, where a husband obliged himself by antenuptial contract to provide a certain sum to the younger children of the marriage, provided he should succeed either to the whole of certain estates or to such other part as should be of the yearly value of £3000, and he succeeded to the whole, the Court held that the provisions were due, and that it was irrelevant to allege that the yearly value of the whole estate was under £3000.[3]

Obligations undertaken by the parents of the contracting parties.

1195. Obligations are sometimes undertaken by the parents of the spouses to provide certain sums of money to the children of the marriage, which sums are either made payable to such children immediately on the death of the grandparent, or are payable after the expiration of a liferent previously given to one or both of the spouses.[4] Sometimes a father, while settling a money provision on his daughter, undertakes that, in the eventual distribution of his estate, she shall receive as large a portion as his other children. Such obligations must be fairly met, and it is not permissible to introduce conditions and restrictions in the provisions in favour of the married daughter which have not been applied to the provisions of the other children.[5] But again, such obligations are not

[1] *Cruickshanks' Trs.* v. *Cruickshanks*, 2 Nov. 1853, 16 D. 7.

[2] Pet. *Maxwell*, 27 Feb. 1857, 19 D. 571. The section (11 and 12 Vict., cap. 36, § 8) provides, that where the heir in possession or heir-apparent shall "have secured, by obligation in any marriage-contract, *the descent of such estate* upon the issue of the marriage," it shall not be competent to disentail until the birth of a child who, by himself or guardian, shall consent, unless the trustees of the contract shall consent to the application. In this case the Court held the consent of the father, and also of the trustees of the marriage-contract, sufficient to obviate any objection to the disentail on the score of the interest of the younger children.

[3] *Erskine* v. *Williams*, 14 Dec. 1843, 6 D. 226.

[4] Such an obligation is obviously of an onerous character; *Miller's Trs.* v. *Miller*, 23 Feb. 1848, 10 D. 765.

[5] *Maude* v. *Wright's Trs.*, 1878, 5 R. 570.

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to be extended by implication, and so, where the annuity promised by the wife's father was to be paid—(1) during the subsistence of the marriage; (2) in case of the husband's survivance, for his benefit and that of the children of the marriage; and (3) in case of the wife's survivance, but no provision was made for its continued payment for the benefit of the children after the death of both the spouses,—it was held that the obligation could not be extended to the case which had occurred.[1] In a case where the wife's father bound himself to pay to her after his death a sum equal to "the portion or fortune" which any of his other daughters might have from him, and he afterwards, in the marriage-contract of another daughter, bound himself to pay her £2000 at his death, with interest from the date of the marriage, it was held that the daughter first married was entitled to claim an equivalent for the whole sum received by her sister, inclusive of interest.[2] In another case, the husband's father bound himself to pay to his son a portion of £1000, and also "to put him on an equal footing" with the other younger children; he afterwards settled an annuity of £200 a year upon his daughter, payable from the date of her marriage. It was found that the son was entitled to an equivalent for the annuity, and that the father's obligation was not discharged by his leaving the son a share of his residuary estate equal to that of the other children.[3] Where a wife's father undertook to provide her in a share of his father's succession, which had not yet opened to him, and eventually the succession was exhausted by the payment of debts and the widow's terce, it was held that a sum which the obligant ultimately received as the representative of his mother, including a portion of her terce, was not subject to the marriage-contract obligation.[4]

Provisions by way of jointure.

1196. (2.) The most usual mode of making a provision for the widow of a landed proprietor is by way of jointure, which is a fixed annuity payable out of the rents of the estate. The husband obliges himself to infeft her in security. The annuity is understood to be chargeable with a proportion of the public burdens exigible from the estate.[5] Where a jointure is fixed at a certain proportion of the rental, the value must be struck as at the death of the husband, and not at the time of the constitution of the annuity, as is the case with a provision by way of locality.[6]

Value of estate: at what period to be estimated.

[1] *Dolphin's Trs.* v. *Baxter*, 1888, 15 R. 733.

[2] *Macqueen* v. *Nasmyth*, 29 Jan. 1831, 9 Sh. 355.

[3] *Threshie* v. *Threshie's Trs.*, 8 Feb. 1845, 7 D. 403.

[4] *Spalding* v. *Small*, 13 Nov. 1821, 1 Sh. 123, N.E. 121.

[5] Erskine, 2, 9, 61; Bankton, vol. 1, pp. 651, 658.

[6] *Douglas* v. *Douglas*, 15 May 1822, 1 Sh. 408, N.E. 382; *Rothes* v. *Rothes*, 29 Jan. 1829, 7 Sh. 339; *Macpherson* v. *Macpherson*, 24 May 1839, 1 D. 794; *Menzies* v. *Menzies*, 10 July 1855, 17 D. 1090.

Where the annuity is made payable at the first term after the husband's death out of the rents of his entailed estate, it is held to be payable in advance; but the heir of entail paying the annuity has a claim against the apportioned rents falling to the executors for a proportion of the first termly payment corresponding to their share of the rents.[1] In one case, where the annuity was made to run from the period of death, the widow was found entitled to immediate payment, although the rents were postponed.[2]

Provisions by way of locality: estimation of value.

1197. Provisions to wives by way of locality are not often met with, except in the settlements of proprietors of entailed estates. Until the passing of the Aberdeen Act, the powers of heirs-substitute in the matter of providing for widows and children were strictly circumscribed by the terms of the entail. In order that these might not become too restricted, in consequence of the tendency of landed property to rise in value, the powers of burdening conferred by entailers were commonly made to bear a certain proportion to the rental; being in the case of provisions to children fixed at so many years' rent; and in the case of widows, restricted either to a certain proportion of the free rental, or to the rental of a certain portion of the estate, called the locality lands, in which the husband was at liberty to secure his wife by infeftment.[3] In estimating the value of provisions to wives and children, whether having relation to the rental or the lands, the rent of valuable shootings is to be taken into account, whether they are actually let or not.[4]

At what period the value of the lands is to be estimated.

1198. The value of locality lands is usually taken as at the time of the constitution of the provision, and not as at the husband's death.[5] But this principle seems to have been unsettled by the final decision of the Court in the case of *Menzies*, where the value of the shootings was directed to be estimated as at the death of Sir Neil Menzies, the granter of the locality.[6] As in the case of a jointure, a liferentrix by way of locality is liable for a share of the public burdens, &c.[7] She is also liable to defray, out of her part of the rents, the expense of necessary repairs,[8] but not of improvements or extraordinary expenses.[9] A liferentrix of locality is

[1] *Paul* v. *Anstruther*, 2 Macph. (H.L.) 1.

[2] *Cruickshank* v. *Sandeman*, 16 Feb. 1843, 5 D. 643.

[3] 1 Bell's Com. 7th ed. 683.

[4] *Menzies* v. *Menzies*, 10 Mar. 1852, 14 D. 651; see 10 July 1855, 17 D. 1090. See *Macpherson* v. *Macpherson*, 13 August 1846, 5 Bell, 280; 24 Mar. 1839, 1 D. 794, locality cases. *Leith* v. *Leith*, 5 June 1862, 24 D. 1059, as to children's provisions.

[5] 1 Bell's Com. 7th ed. 54; *Malcolm* v. *Malcolm*, 21 Nov. 1823, 2 Sh. 514, N.E. 453; *Agnew* v. *Agnew*, 10 Dec. 1810, reported in a note to case of *Gordon*, 24 Jan. 1811, F.C.

[6] *Menzies* v. *Menzies*, 10 July 1855, 17 D. 1090.

[7] Ersk. 2, 9, 61.

[8] Ersk. 2, 9, 60; *Scot* v. *Halyburton*, 27 June 1823, 2 Sh. 435, N.E. 388; *Cuningham* v. *Cuningham*, 1733, M. 8275.

[9] *Anstruther* v. *Anstruther*, 14 May 1823, 2 Sh. 306, N.E. 269; *Moreham* v. *Binston*, 1679, M. 8499; Stair, 2, 6, 19.

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subject to the usual restrictions of liferenters by constitution in regard to the cutting of trees [1] and working of minerals; [2] and of course she is not liable to the obligations nor entitled to the privileges of a superior.[3]

Provisions of conquest: "conquest" a term of flexible meaning.

1199. Another form of marriage-contract provision is that in which the husband settles the conquest of the marriage upon his widow and children in certain proportions, or by way of a destination in liferent and fee. "Conquest" represents the acquisitions of the husband during the marriage, exclusive of what he may acquire by succession,[4] bequest,[5] or donation.[6] The ascertainment of conquest, therefore, involves an inquiry into the wealth of the husband at the date of the marriage, unless the amount be conventionally fixed by specifying the deduction which is to be made from the free estate as at the dissolution of the marriage.[7] If it appear that the parties to the contract meant to attach a conventional meaning to the word "conquest," their definition, and not the legal meaning of the word, will constitute the law of their succession.[8] For example, a lady, by her antenuptial contract of marriage, conveyed to trustees "all sums of money, &c. which she may conquest or acquire during the subsistence of the said intended marriage;" and after her marriage she succeeded *ab intestato* to one-half of her father's estate, heritable and moveable, and to £1500 under her parents' contract of marriage. It was held by the House of Lords, affirming the judgment of the Court of Session, that the verbal expression "may conquest" should receive a construction consistent with the context; that it did not restrict the meaning of the word "acquire"; and that the clause was effectual as a general conveyance of *acquirenda*, comprehending the succession in question.[9] Provisions of "conquest," most probably on account of the ambiguity of the term, and the difficulty of ascertaining what is comprehended in it, are not now much used, and the cases belong mostly to the last century.[10] A more common form of provision is

[1] See Ersk. 2, 9, 58; *Dickson* v. *Dickson*, 24 Jan. 1823, 2 Sh. 152, N.E. 138; *Macalister's Trs.* v. *Macalister*, 27 June 1851, 13 D. 1239.

[2] See *Douglas* v. *Douglas*, 15 May 1822, 1 Sh. 408, N.E. 382; *Waddell* v. *Waddell*, 21 Jan. 1812, F.C.

[3] Bell's Prin. § 1055; *Henderson* v. *Mackenzie*, 19 Feb. 1836, 14 Sh. 540. See *Gibson-Craig* v. *Cochrane*, 23 Sept. 1841, 2 Rob. 446, affirming 16 Sh. 1332.

[4] Stair, 3, 5, 22; Ersk. 3, 8, 43; Bell's Prin. § 1795.

[5] *Rae* v. *Rae*, 23 Jan. 1810, F.C.

[6] 1 Fraser, 757, citing *Mercer* v. *Mercer*, 1730, M. 3054; and Kames' Elucid., ed. 1777, p. 41.

[7] *Hunter's Trs.* v. *Campbell*, 25 May 1839, 1 D. 817.

[8] Stair, 2, 6, 3.

[9] *Diggens* v. *Gordon*, 3 Macph. 609; 20 May 1867, L.R. 1 Sc. App. 136; 5 Macph. (H.L.) 75.

[10] In the construction of provisions of this description, it was held that the husband was not thereby precluded from making rational provisions to the wife and children of a second marriage; *Anderson* v. *Bruce*, 1680, M. 12,890.

that in which one of the spouses disposes of all the estate pertaining or that shall pertain to him or her at death, or at the dissolution of the marriage, in trust. A conveyance in this form was held not to include the money due under a policy of insurance, and a bequest of the proceeds of the policy was held good.[1]

Effect of provision of estate which shall belong to granter at death.

1200. (3.) As to settlements of *acquirenda*, a broad distinction lies between an obligation to provide, or (which is the same in legal effect) a conveyance of property which shall belong to the granter at the time of his decease, and a general conveyance of *acquirenda* to trustees. In the first case, the parent remains the full owner, and may, as said by Lord Watson in the case of *Macdonald*,[2] during his lifetime squander his entire means if he thinks fit; in the second case, the parent is divested. Conveyances of *acquirenda* to trustees are in practice confined to the wife's estate, the object being to protect her estate against the husband's creditors. The distinction is illustrated by two of the most recent cases on this subject. In the case of *Wyllie's Trustees*[3] the husband conveyed to trustees his property of every description "*now belonging* or which shall belong to him *at the time of his decease*," including certain specified estate of which he was then possessed. Before his marriage the truster had acquired a prospective interest in the testamentary estate of his father; this right vested during the subsistence of the marriage, the marriage-contract having meantime been intimated to the father's testamentary trustees. In a competition between the marriage trustees and an arresting creditor the claim of the marriage trustees to this fund was sustained, but only on the ground that the husband's prospective interest in his father's estate was a *spes successionis* which he was entitled to convey, and was in the sense of the marriage-contract "property now belonging to him," whence it followed that the subsequent intimation of the vested right constituted a good conveyance or real right in implement of the general conveyance in the marriage-contract. Lord Kinnear, who delivered the judgment, said: "When the truster by his marriage-contract settles everything belonging to him, and also everything that shall belong to him at his death, he conveys exactly what he says, the property that belongs to him at the date of the contract, and also what shall be found to belong to him at his death, but he does not deprive himself of any right of property or power of control in subjects he may acquire after the date of the marriage-contract during his lifetime, and accordingly

[1] *Scottish Equitable Insurance Co.* v. *Champion*, 6 Nov. 1857.

[2] *Macdonald* v. *Scott*, 24 July 1893, L.R. 1893, App. Ca. 642, at p. 655; *Lowden's Trs.* v. *Lowden*, 1881, 8 R. 744, per Lord Moncreiff; *Arthur and Seymour* v. *Lamb*, 1870, 8 Macph. 923.

[3] *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121; *Buchanan's Trs.* v. *Whyte*, 1890, 17 R. (H.L.) 53.

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the property which belongs to him at his death, and which he has acquired after the date of the marriage-contract, will be subject to all the debts which he may have contracted during his lifetime."[1]

Effect of provision of estate which may be acquired during subsistence of marriage.

1201. This case may be contrasted with that of *Simson's Trustees*,[2] where a wife by antenuptial contract conveyed to trustees "the whole estate, &c. presently belonging to her, or which she may succeed to or acquire *during the subsistence of the said intended marriage*." An aunt of the wife by her will left the wife a share of her estate, under the declaration that it should not fall under the control of the marriage trustees. This declaration, by a decision of the whole Court, was held to be inoperative, seeing that the testator had not provided a continuing trust, but had directed the share to be paid to her legatee, who on receiving payment became bound to transfer the money to her marriage trustees in implement of her antenuptial conveyance.

Effect of special provisions relating to settlement of *acquirenda*.

1202. An important exception to the effect of a conveyance of *acquirenda* was recognised in *Boyd's Trustees* v. *Boyd*,[3] viz., that such a conveyance, even when it enbraces all the estate which the wife "may conquest and acquire during the subsistence of the marriage," does not include life interests and annuities. Where a conveyance of *acquirenda* is indefinite as to time, its operation is confined in construction to property acquired or to be acquired during the subsistence of the marriage, and property acquired after its dissolution is not affected.[4] An exception of a different nature was admitted in *Russell's Trustees*.[5] The wife, by words of direct gift in their antenuptial contract, conveyed to her husband and his heirs all the estate then belonging to her, or which she might acquire during the subsistence of the marriage, or which should belong to her at death. The wife survived the husband, and in a question between the husband's testamentary trustees and the wife's next of kin, it was held that the conveyance was qualified by the implied condition that the husband should survive her. It is difficult to reconcile this case with the subsequent decision of the House of Lords in the case of *Buchanan's Trustees*,[6] and this difficulty is not lessened by the reason given by the Lord President, viz., that the contrary construction involved the deprivation by the wife of her

[1] 18 R. 1128.

[2] *Simson's Trs.* v. *Brown*, 1890, 17 R. 581 (whole Court); *Douglas' Trs.* v. *Kay's Trs.* 1879, 7 R. 295.

[3] *Boyd's Trs.* v. *Boyd*, 1877, 4 R. 1082, where Lord Moncreiff quoted Lord Hatherley's opinion *in re Mainwaring's* settlement, L.R. 2 Eq. 487, and *White* v. *Briggs*, 1848, 22 Beav. 126, note. This case was followed in Sp. Ca. *Young's Trs.* (1st Div.) 1885, 12 R. 963.

[4] *Wardlaw* v. *Wardlaw's Trs.*, 1879, 7 R. 1066; see *Scottish Equitable Insurance Co.* v. *Champion*, 6 Nov. 1857.

[5] Sp. Ca. *Russell's Trs.*, 1887, 14 R. 849.

[6] 17 R. (H.L.) 53.

whole property on the husband's decease, in apparent forgetfulness of the principle that a mere general conveyance of *acquirenda* leaves the grantee in the uncontrolled possession of his fortune during his lifetime. According to the decision in *Buchanan's* case, Mrs. Russell would not be dispossessed of her estate at the dissolution of the marriage, but her estate would pass at her death to her husband's heirs. Among the numerous special decisions respecting such conveyances, we note that *universal* words descriptive of the estate conveyed are not necessarily or usually controlled by a subsequent specification;[1] that an interest undisposed of by the directions to trustees remains with the granter;[2] and that there is a *presumption* that the wife's property as existing at her death is property acquired by her in the sense of the contract.[3]

Provisions secured by policies of assurance and assignations of moveables.

1203. Again, a husband may provide his wife or children in certain specific moveable funds or estate, or may bind himself to execute an assignation of such subjects in their favour. For example, a husband may, and frequently does, bind himself to insure his life for the benefit of his family, and to pay the premiums as they fall due, either directly to the insurance office or to the trustees of the contract.[4] A destination in a policy of assurance to the wife of the insured and her representatives is a valid mode of creating a provision in her favour;[5] but it is doubtful whether a valid provision can be constituted by taking a bank deposit-receipt payable to the wife.[6] Where the husband becomes unable from proverty to pay the premiums due on a policy of insurance for the benefit of his family, he may, as it was once held, be relieved of the obligation upon an application to the Court stating the circumstances.[7]

Provisions of furniture or other corporeal moveables.

1204. Another example of a provision of specific moveable subjects by marriage-contract occurs in the destinations, so frequent in such deeds, of the household furniture to the wife, sometimes in liferent and sometimes in fee, or with a right on the part of the children to redeem it at a certain price, and within a specified period. In the case of settlements of considerable landed estates, where the family residence goes to the heir and not to the widow, it is usually provided that the furniture is to go with the mansion-house, the heir being sometimes taken bound to pay a money equivalent to the widow, or to the personal representatives. It

[1] *Mackie* v. *Mackie's Trs.*, 1883, 11 R. 255.

[2] Sp. Ca. *Higginbotham's Trs.*, 1886, 13 R. 1016.

[3] *Young's Trs.* v. *Young's Trs.*, 1892, 20 R. 22.

[4] 1 Bell's Com. 7th ed. 684.

[5] *Galloway* v. *Craig*, 17 July 1861, 23 D. (App. Ca.) 12, 4 Macq. 267, reversing 22 D. 1211.

[6] *Cuthill* v. *Burns*, 20 March 1862, 24 D. 849.

[7] *Gibb* v. *Pitcairn*, 8 June 1839, 1 D. 889.

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seems to have been considered at one time that a liferent of the furniture in a mansion-house only entitled the liferenter to use it within the house, not to carry it elsewhere.[1] Liferent of furniture is a somewhat anomalous description of right, as the subject is liable to deterioration; and the Court would probably not be disposed, unless for very strong reasons, to control the liferenter's use of it, or to interfere, except for the purpose of preventing an alienation.[2] The construction of terms occurring in bequests of household furniture, plate, pictures, and articles of domestic utility or ornament is elsewhere considered.[3] The principle of construction, it is needless to say, is identical, whether the expression occurs in a legacy or in a marriage provision.

Provisions by the wife in favour of the husband.

1205. (4.) With respect to provisions in favour of the husband, little need be said. Any money contributed by the wife or her parents on the occasion of her marriage is either—(1) settled to her own use, exclusive of her husband's *jus mariti* and right of administration, with or without an ulterior destination to the children of the marriage; or (2) paid over to the husband absolutely; or (3) vested in trustees for the liferent alimentary use of the spouses and the survivor, fee to the children, restrictable to a liferent, and subject to a power of division. As regards money paid over to the husband in name of tocher, little need be said; for, when the money is paid, it becomes his absolute property, and no question can arise regarding it. If not paid on the completion of the contract, the husband has an action for it against the wife's father, or other relative by whom the tocher was promised; but it would seem, on the authority of the older cases, that where the tocher comes directly from the wife, payment is more easily presumed than in the case of ordinary debts.[4]

Obligations undertaken by the parents or relatives of the wife.

1206. Where, instead of an immediate payment, an obligation is undertaken by the wife's relatives to settle a certain share of succession upon the family, it seldom happens that the husband takes any interest under such an arrangement. The obligation usually is to settle a certain sum upon the wife in liferent and the children in fee. Some examples of this form of provision have been noticed at the commencement of the chapter. The cases on the law of vesting afford numerous examples of such provisions.

1207. The conveyance by the wife to the husband of a fund in

[1] *Cochran* v. *Cochran*, 1755, M. 8280.

[2] See 1 Fraser, 759; 2 Bell's Illustrations, 141; *Rogers* v. *Scott*, 19 July 1867, 5 Macph. 1078.

[3] Chapter XVIII., Section II.

[4] See the cases collected in 1 Fraser, 780, where the reader will also find a summary of the older decisions upon a variety of points in the law as to tocher, which are now of little importance, as it is now the practice to make the disposal of the wife's fortune the subject of express stipulation in the contract.

name of tocher, in an antenuptial contract, gives him a vested right in possession, which transmits to his representatives, and may be attached by his creditors. After the husband's death, the wife cannot, in a question with his creditors, plead retention of the tocher on the ground that the provisions in her favour were not implemented.[1] Lord Fraser was of opinion that, if payment were demanded by the husband himself, he would not be entitled to it without at the same time tendering such security for the wife's provisions as he might by the contract have agreed to give;[2] and this seems reasonable.

Rights of the husband and his creditors in the tocher.

SECTION II.

Postnuptial Provisions.

1208. With respect to the manner in which postnuptial provisions may be constituted, reference is made to the preceding section, in which the various forms of antenuptial provision have been considered. The points of difference between the two classes of provisions relate to the onerosity rather than to the substance of the provisions.[3]

Distinguished from antenuptial provisions in relation to onerosity.

1209. (1.) In entering into a postnuptial contract the wife does not appear in the character of an independent contracting party; she is therefore in a less favourable position to compete with creditors than if her claim were upon an antenuptial contract. On another principle, however, the law supports a rational postnuptial provision to the wife, to the effect of giving her a *jus crediti* in bankruptcy; that principle being, that as the husband is bound to make a reasonable provision for his wife at the time of the marriage, his subsequent settlement in fulfilment of that obligation is binding on his fortunes and estate.[4] It is implied in the statement of this proposition that the provision must be rational,—that is, suitable to the circumstances of the husband; for if otherwise, it is not a provision in fulfilment of the obligation in question.[5] It is also implied in the rule that the husband is understood to be solvent at the time of granting the provision; for if he were not, there is no

Rational postnuptial provisions to wives are effectual against creditors.

[1] *Boswell* v. *Miller*, 4 Feb. 1846, 8 D. 430; *Greenhill* v. *Aitken*, 24 June 1824, 3 Sh. 169, N.E. 114; *Woollen Manufactory of Haddington* v. *Gray*, 1761, M. 9144.

[2] 2 Fraser, 2d ed. p. 1397.

[3] Is a deed signed immediately after a marriage equivalent to an antenuptial contract?—See *Cooper* v. *Cooper*, Feb. 24, 1885, 15 R. (H.L.) 22.

[4] Stair, 1, 9, 15; Ersk. 4, 1, 33; 1 Bell's Com., 7th ed. 687; *M'Gregor's Trs.* v. *M'Gregor*, 22 Jan. 1820, F.C.; *Hepburn* v. *Brown*, 2 Dow, 342; *Jeffrey* v. *Campbell*, 24 May 1825, 4 Sh. 32; *Sharp* v. *Christie*, 19 Jan. 1839, 1 D. 396; and see *Montgomery* v. *Hart*, 17 July 1845, 7 D. 1081; *Craig* v. *Galloway*, 4 Macq. 267.

[5] *Miller* v. *Learmonth*, *infra*.

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free estate to be bound. Again, it is a condition of every effective postnuptial settlement that the wife takes an unqualified right to her provision; a widow cannot compete with the husband's creditors for a provision which may be revoked at the pleasure of the husband.[1] It is observed by Lord Fraser[2] that the time for estimating the rationality of the provision is the time when it comes into operation,—that is, when it may be demanded. There is some authority to the effect that a postnuptial provision granted to a wife in insolvency may be supported to the extent of providing her with a bare subsistence;[3] but in the more recent cases this doctrine has been discountenanced, and it cannot now be regarded as matter of settled law.[4] It will of course be understood that a rational postnuptial provision to a wife is binding on the husband personally, and his representatives, as well as upon those who administer his estate for the benefit of creditors.

Husband cannot by postnuptial contract secure a provision to his wife to take effect in his lifetime.

1210. The preceding observations have reference solely to postnuptial provisions granted by a husband to his wife to take effect after his death; for a husband cannot, even when solvent, by a postnuptial conveyance to trustees, secure an annuity to his wife during his lifetime. Such conveyances are held to be revocable donations; and the subsequent bankruptcy of the husband operates as a revocation in favour of creditors.[5] The argument, that an annuity payable *stante matrimonio* is a fulfilment of the natural and legal obligation to aliment the wife during the marriage, was thus disposed of by Lord Chelmsford in the case of *Dunlop* v. *Johnston*:—"What is this natural and legal obligation? It is to support and aliment the wife and children during the marriage according to his ability. There is no natural obligation recognised by Scotch law to divest himself of a portion of his property, and put it out of his control to provide for his wife and children. On the contrary, it would rather appear to be his natural duty to preserve his right, as head of the family, to dispense his means according to a just view of his obligations."[6] Still less can a husband, by settling his own money for his own alimentary use during the marriage, and thereafter in trust for his wife and children, obtain protection for the income of his estate against creditors.[7]

1211. (2.) There seems to be no material distinction between the

[1] *Honeyman and Wilson* v. *Robertson*, 1886, 14 R. 163.

[2] 2 Fraser, 2d ed. p. 1498.

[3] Ersk. 4, 1, 33.

[4] See *Sharp* v. *Christie*, *ut supra*; *M'Lachlan* v. *Campbell*, 13 Feb. 1823, 2 Sh. 217, N.E. 192; and 29 June 1824, 3 Sh. 192, N.E. 132; Bell's Com., *ut supra*.

[5] *Dunlop* v. *Johnston*, 2 April 1867, L.R. 1 Sc. App. 109, 5 Macph. (H.L.) 22.

[6] L.R. 1 Sc. App. 112.

[7] *Learmonth* v. *Miller*, May 3, 1875, 2 R. (H.L.) 62, affirming 10 Macph. 107; *Ker* v. *Justice*, 1866, 5 Macph. 4. See Chapter XXXIII., Section IV. (Alimentary Provisions).

cases of antenuptial and postnuptial provisions to children in regard to the nature of the rights which the children may claim in competition with creditors. In either case a *jus crediti* may be conferred, in respect of rational provisions payable at a period which may happen during the father's lifetime;[1] whilst provisions payable after his death, unless secured by infeftment or intimated assignation, are postponed to the claims of creditors.[2] The right of the children as against the father depends, however, upon different considerations in the two cases. Onerosity is implied in the case of an antenuptial provision, and the right of the children is irrevocable. But provisions granted to children after the marriage are gratuitous, and may be revoked unless there has been a divestiture of the parent, or at least delivery of the deed of provision.[3] It was observed in *Thornhill* v. *M'Pherson*,[4] that if the contracting spouses should agree to put the postnuptial contract into the fire, they would effectually revoke its provisions, and bar the claims of the children under it.

Postnuptial provisions to children, gratuitous and revocable.

1212. It has been considered that provisions to children bearing to proceed from both the spouses would not during the wife's lifetime be revocable by the sole act of the husband.[5] It would appear from decisions antecedent to the date of the Moveable Succession Act, 1855, that the death of either of the spouses was held to give the children an indefeasible right, on the ground that the conventional provisions were of the nature of a *surrogatum* for the claims of legitim and mother's share of the goods in communion.[6] Since the abolition of the last-mentioned right, the reason of the rule no longer exists in the case of the father being the survivor of the spouses. Where a husband settled his estate for the benefit of his wife in liferent in the event of her survivance, and of the children in fee, it was held that the vesting of the provisions in favour of the children of the marriage was conditional on the mother being the survivor of the spouses, and that on her predecease the father was entitled to revoke them.[7]

Whether postnuptial provisions to children are revocable by the father *sua sponte*.

1213. Reference is made to a subsequent chapter (Powers of

[1] See *Jeffrey* v. *Campbell*, 24 May 1825, 4 Sh. 32, N.E. 33.

[2] *Herries, Farquhar, and Co.* v. *Brown*, 9 Mar. 1838, 16 Sh. 948; *Poole* v. *Anderson*, 22 Feb. 1834, 12 Sh. 481; *Macgregor* v. *Macdonald*, 9 Mar. 1843, 5 D. 889.

[3] *Miller* v. *Learmonth*, per Lord President Inglis, 10 Macph. 107, see p. 112; *Morice* v. *Sprot*, 1846, 8 D. 918; *Jarvie's Trs.*, 1887, 14 R. 411.

[4] *Thornhill* v. *M'Pherson*, 20 Jan. 1841, 3 D. 394.

[5] See *Blair* v. *Hamilton*, 1714, M. 6110.

[6] *Wood* v. *Fairley*, 3 Dec. 1823, 2 Sh. 549, N.E. 477; *Gentle* v. *Aitken*, 23 June 1826, 4 Sh. 749, N.E. 757; *Anderson* v. *Garroway*, 27 Jan. 1837, 15 Sh. 435.

[7] *Dickson* v. *Somerville's Trs.*, 3 Macph. 602; 16 May 1867, 5 Macph. (H.L.) 69; *Lang* v. *Brown*, 24 May 1867, 5 Macph. 789.

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Appointment) on the subject of the effect of postnuptial provisions granted in pursuance of reserved powers.[1]

Wife's claim to a settlement under the Conjugal Rights Act.

1214. (3.) The Conjugal Rights Act, 1861, enacts that, "when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf."[2] The amount of the wife's provision is by this section left to the discretion of the Court of Session, to be exercised "with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*."[3] The statutory claim is liable to be defeated by

Wife's claim liable to be defeated by diligence, &c.

[1] Chapters LIX. and LX.

[2] 24 and 25 Vict., cap. 86, § 16. See *Somner* v. *Somner's Tr.*, 1871, 9 Macph. 594; *Taylor* v. *Taylor*, 1871, 9 Macph. 893; *Jack* v. *Ferguson*, 1878, 5 R. 624; *Reid* v. *M'Walter*, 1878, 5 R. 630; *Clark* v. *Clark*, 1881, 8 R. 723.

[3] In England this jurisdiction was first assumed by the Court of Chancery in cases where it was necessary to apply to that Court for assistance in order to obtain possession of the wife's property—1 Wh. & T. L. Ca. 362, 6th ed. 507, when the Court, acting on the maxim that he who seeks equity must do equity, refused to interfere unless a provision were settled on the wife in fulfilment of the husband's duty of providing for her; *Bosvile* v. *Brander*, 1 P. Wms. 457. The wife's equitable right arising in such circumstances is called her *equity to a settlement*. See *Duchess of Buckingham* v. *Winterbottom*, 13 June 1851, 13 D. 1129.

The doctrine has since been greatly extended. It is now competent to the wife to assert her right actively, and not merely *ope exceptionis; Elibank* v. *Montolieu*, 5 Ves. 737; 1 Wh. & T. 6th ed. 486; see *Newenham* v. *Pemberton*, 1 De G. & Sm. 644. The wife's equity to a settlement is binding not only on the husband, but upon his *assignees* in bankruptcy, or under a general trust for payment; and it may be made to affect *legal* as well as *equitable* interests, if the property should become the subject of a Chancery suit; *Sturgis* v. *Champneys*, 5 My. & Cr. 97, where all the previous authorities are cited by Lord Cottenham. See also *Hanson* v. *Keating*, 4 Hare, 1, decided by Sir J. Wigram. A wife is entitled to a settlement out of property to which she becomes entitled, whether before or after marriage; *Barrow* v. *Barrow*, 18 Beav. 529.

Where the wife insists for her equity, it is extended to her *children;* and the Court direct a reference or remit to ascertain what is a proper settlement to be made upon her and her children; *Elibank* v. *Montolieu, ut supra; Johnson* v. *Johnson*, 1 J. & W. 472. But if the wife has died without asserting her right, the children have no claim; *Scriven* v. *Tapley*, 2 Eden. 337, the leading case; *De la Garde* v. *Lempriere*, 6 Beav. 344, decided by Lord Langdale.

The questions of greatest importance with reference to the provisions of the Conjugal Rights Act (24 and 25 Vict., cap. 86, § 16) relate to the amount and the mode of the settlement. As to the amount, the usual practice of the Court of Chancery is to settle one-half of the wife's property upon herself, reserving the other half for the husband or his creditors; see Wh. & T. L. Ca. 6th ed. 519. But in particular circumstances the rule may be varied. In one case, where a husband had separated from his wife, leaving her unprovided for, Sir L. Shadwell, V.-C., gave her three-fourths;

priority of diligence; and since the passing of the Married Women's Property Act, 1881, this enactment has ceased to be of importance, as it only gives the wife, in case of the husband's insolvency, the right which every woman who marries without a contract has under the Statute of 1881. It need hardly be added that it is by settlements in trust that preferable and fixed provisions can best be secured to the use of married women out of their estates.

SECTION III.

Marriage Provisions, how secured (Obligation, Destination, Trust).

1215. The rules on this subject admit of being stated within a brief compass. The application of these rules to the construction of the different species of provisions which have been described in the preceding section has given rise to questions not unattended with difficulty. The leading principle is, that a simple unilateral obligation in a marriage-contract in favour of either of the parties is onerous, the marriage being regarded as a counter prestation. The wife has therefore a *jus crediti*, entitling her to rank with other creditors for the value of her provisions.[1] Provisions to children, on the other hand, are only onerous in the event of their being made payable at a period which may arrive before the death of the father, by whom they are promised; as, for example, at the dissolution of the marriage, or at the majority or marriage of the child,[2] or by being made to bear interest for such a period.[3]

Obligation in favour of the contracting parties is onerous.

Obligation in favour of children not onerous unless it is prestable before the dissolution of the marriage.

Coster v. *Coster*, 9 Sim. 597. See also *ex parte Pugh*, 1 Drew. 202; *Vaughan* v. *Buck*, 1 Sim. N.S. 284. By more recent cases it has been settled, after considerable fluctuation, and notwithstanding the authority of an adverse decision by Lord Ch. Sugden (*Napier* v. *Napier*, 1 D. & W. 407), that the Court may in special circumstances settle the whole fund on the wife; as, for example, where the husband has already received large sums from the wife's father, which have been squandered or applied in liquidation of debt; *Gardner* v. *Marshall*, 14 Sim. 575; or where the fund is of inconsiderable amount; *in re Kincaid's Trusts*, 1 Drew. 326; or where there has been misconduct on the part of the husband; *Dunkley* v. *Dunkley*, 2 De G. M'N. & G. 390; *in re Cutler*, 14 Beav. 220; *in re Merriman's Trusts*, 31 L.J. Ch. 367.

As to the mode of settlement, it seems the usual practice of the Court of Chancery is to settle the income of the fund upon the wife to her separate use, and the capital upon the children, payable in the case of sons at majority, in the case of daughters at majority or marriage; *Gent* v. *Harris*, 10 Hare, 383, 384; *Francis* v. *Brooking*, 19 Beav. 349. If there should be no issue, the reversion will be given to the surviving spouse; *Carter* v. *Taggart*, 1 De G. M'N. & G. 286; *Bagshaw* v. *Winter*, 5 De G. & Sm. 466.

[1] Accordingly, in the event of the husband's bankruptcy, the wife may rank for the provisions, as for a contingent claim, under the Bankruptcy Act.

[2] *Adv.-Gen.* v. *Trotter*, 14 Jan. 1847, Exch. Rep.; *Cruikshanks' Trs.* v. *Cruikshanks*, 2 Nov. 1853, 16 D. 7; *Jolly* v. *Graham*, 24 Feb. 1824, 2 Sh. 730, N.E. 611.

[3] *Mackenzie of Redcastle's Crs.* v. *His Children*, M. 12,924, 1 June 1795, 3 Pat.

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Whether marriage-contract provision can be regarded as testamentary to any effect.

1216. It is needless to inquire into the reason of the distinction. It probably originated in the notion that provisions to children payable after death were of a testamentary character. That reason, at all events, is no longer valid; for it was decided by the Court of Exchequer, in a case where a sum of money was provided by a husband in his antenuptial contract, payable to the children of the marriage at the first term of Whitsunday or Martinmas after their father's death, and which was declared to be in full of legitim and executry, that a provision of this nature was not testamentary, and was therefore not liable to legacy duty.[1] Lord Fullerton, however, observed, that even in marriage-contracts there might be provisions of such a clearly testamentary character as to bring the deed within the category of a testamentary instrument; and he instanced the case of a settlement by marriage-contract of all the estate belonging to the parties at their death.[2]

In what cases children have a *jus crediti*.

1217. The rules according to which the right of the children is determined to be either a *jus crediti* or a *spes successionis* are succinctly explained in the following passage from Lord Moncreiff's opinion in a leading case:[3]—

"1. I understand the rule of law to be, that under such marriage-contracts the children have a *jus crediti*, giving them such a right against the creditors of their father, if the provision is so conceived as that there was or might be a direct interest accruing to them in the lifetime of the father. As, for example, if the provision is made payable on the marriage or majority of the child, though such event should happen in the lifetime of the father; or if the provision is declared to bear interest from any such term which might be in his lifetime; or if it is declared to be payable at the dissolution of the marriage, or to bear interest from and after that event, which may happen by the wife's predecease.

409. Compare these cases with *Mactavish*, 1787, M. 12,922, and *Brown* v. *Govan*, 1 Feb. 1820, F.C., where the provisions, not being payable at a time certain, were held not to confer a *jus crediti*. The subsequent cases (other than these specially mentioned in the sequel) merely confirm the rule stated in the text. The following is a complete list of them:—*M'Millan* v. *M'Millan*, Hume, 536; *Wilson* v. *Wight*, Hume, 537; *Macintosh* v. *Gibson*, Hume, 10; *Grierson* v. *Wallace*, 1 Sh. 13, N.E. 9; *Brown* v. *Paterson*, 3 Sh. 6, N.E. 5; *Scott* v. *Ross*, 1 Sh. 481, N.E. 448; *Bushby* v. *Renny*, 4 Sh. 110, N.E. 112; *Gordon* v. *Murray*, 11 Sh. 368; *Villiers* v. *Connell*, 12 Sh. 19; *Geddes* v. *Waddell*, 14 Sh. 1084.

[1] *Adv.-Gen.* v. *Trotter*, 14 Jan. 1847, Exch. Rep., also 10 D. 56.

[2] See p. 34 of the separate report. See also *Somerville* v. *Somerville*, 18 May 1819, F.C., where a delivered deed was presumed to be ambulatory and revocable, because it conveyed the *universitas* of the granter's estate.

[3] *Goddard* v. *Stewart's Children*, 9 Mar. 1844, 6 D. 1018. See the doctrine explained also in the leading opinion in *Herries, Farquhar, and Co.* v. *Brown*, 9 Mar. 1838, 16 Sh. 964; and in 1 Bell's Com. 5th ed. 640.

"2. But, on the other hand, if the provision is so conceived that the principal is not payable until after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be claimed or taken in his lifetime, there is no *jus crediti* vested in the children as against onerous creditors. In respect of the father and his heirs, they are no doubt creditors; but in respect of his creditors, they are merely heirs, having no more than a *spes successionis*.

"3. I understand it also to be a fixed rule, that it has no effect in conferring a *jus crediti* on the children, that, instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable.

"4. But if he actually lends out the money, or constitutes a trust, or grants heritable security to the wife or any other person in name of the children, with absolute warrandice, it constitutes a fee in the children, which will prevail against onerous creditors." [1]

Terms of payment fixed by the words of the destination.

1218. It may further be observed that ambiguous expressions, pointing to a period of distribution other than the death of the father, will not control the express terms of the destination in a question as to the quality of the right conferred. For example, in the case from which the foregoing rules have been extracted, the father, after obliging himself to content, pay, and secure to the issue of the marriage, *existing at the dissolution thereof*, a certain sum, declared that the children's provisions should be payable in equal instalments at twelve and twenty-four months *after his decease*. It was held that the children had no *jus crediti*.[2] The right of the heir of the marriage under a marriage-contract destination of heritable estate is of the same nature as that of the children in relation to provisions of moveable funds. Unless the father binds himself to infeft his son at a period which may happen in his own lifetime,[3] the right of the son is postponed to that of creditors, and, as regards the father, it is only effectual to bar gratuitous alienations.[4] The father may sell the estate, and in this case the heir may at his death rank as a postponed creditor for the price as a *surrogatum*, the value being estimated as at the date of the sale.[5]

[1] 6 D. 1023.

[2] *Goddard* v. *Stewart's Children*, *ut supra*. See *Browning* v. *Browning's Trs.*, 25 May 1837, 15 Sh. 999, where the destination was similar, and the Court held that no *jus crediti* was conferred, but that the children were entitled to challenge any gratuitous deed of the father executed to their prejudice.

[3] See *Douglas* v. *Douglas*, 1724, M. 12,910.

[4] *Cunynghame* v. *Cunynghame*, 1804, M. 13,029; *Speirs* v. *Dunlop*, 1778, M. 13,026; and see *Ormiston* v. *Ormiston*, 1809, Hume, 531; *Stewart* v. *Stewart*, 2 March 1815, F.C.; *Macneil* v. *Macneil*, 27 Jan. 1826, 4 Sh. 393, N.E. 396; and *Watson* v. *Pyot*, 1801, M. "Provision to Heirs and Children," App. No. 4.

[5] *Cunninghame* v. *Hathorn*, 20 Dec. 1810, F.C.; *Earl of Wemyss* v. *Earl of Haddington*, 28 Feb. 1815, F.C.; 20 May

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Provisions may be secured by a conveyance of specific subjects either to the beneficiaries or to trustees.

1219. Such being the nature of the personal obligations which a husband may undertake for the benefit of his wife or children, it is a simple question of conveyancing—by what description of deed real security may be given for the fulfilment of the obligation.[1] By real security (though the expression is perhaps not strictly accurate) is meant the security afforded by a preferential right to property, whether heritable or moveable in its nature. The answer is, that such security may be given by a completed conveyance, either to the beneficiaries of the marriage-contract, or to trustees for their behoof. Thus the provisions in favour of the wife may be secured by infefting her in lands for her own use, exclusive of the husband's rights, or by assigning personal bonds, policies of assurance, stock, or other moveable rights, under the same form of destination, and duly intimating the assignation.[2] The same result may be attained indirectly by means of a conveyance to trustees for the wife's benefit, provided the trust purposes be such as to give the wife an unqualified right on her husband's death. Any reservation of a power to the husband which he may use for the purpose or to the effect of withdrawing a part of the fund, will render the settlement wholly ineffective in a question with creditors, even though, according to the form of the instrument, the wife's consent should be necessary to the application of the money.[3] Again, it has been decided (and the exception illustrates the principle of the rule) that a husband cannot give his wife a preference over furniture or corporeal moveables which he retains in his possession.[4]

Conveyances in security of provisions to the wife.

Securing of provisions to the children.

1220. Provisions to children may in like manner be secured against the father's voluntary acts, and so as to give the heirs of the marriage a preference in bankruptcy, by means of a conveyance of heritable or moveable property to trustees for their benefit,[5] or to one of the parents for liferent use only, and as fiduciary fiar for the children of the marriage.

Preference may be conferred by con-

1221. The onerosity of the provision arises from the obligation in the marriage-contract; and therefore, although the contract be

1818, 6 Pat. 390; *Sutherland* v. *Gordon*, M. 4398, 1 Cr. St. & Pat. 493.

[1] As to diligence, it has been held that a child having a *jus crediti* might use inhibition or adjudication; *Douglas* v. *Douglas, supra*; *Lyon* v. *Lyon's Crs.*, 1724, M. 8150.

[2] And it would appear that in the case of a variance between the destination in the marriage-contract and that in the security, the former must prevail; *Ross* v. *Masson*, 3 Feb. 1843, 5 D. 483.

[3] *Grant* v. *Robertson*, 1872, 10 Macph. 804.

[4] *Campbell* v. *Stewart*, 13 June 1848, 10 D. 1280; *Brown* v. *Fleming*, 19 Dec. 1850, 13 D. 373; *Hewat's Trs.* v. *Smith*, 1892, 19 R. 403. But these decisions do not necessarily govern the case of furniture which was the property of the wife before marriage, or which may be purchased from the husband's creditors or their trustee for the wife's benefit, and conveyed to her; case in First Division of Court, March 1894.

[5] See, for example, *E. of Glasgow's Trs.* v. *E. of Glasgow*, 1872, 11 Macph. 218.

silent on the subject of security, *if the husband afterwards settle property on his wife or children,* in one or other of the modes mentioned, in fulfilment of his obligation, the security will be as valid and effectual as if it had formed a part of the contract.[1] When security has been given for a marriage-contract provision, it is of little consequence whether the obligation were or were not of such a nature as to confer a *jus crediti* on the children. In considering whether a preference has been secured, the material question is whether the granter was solvent when he made the conveyance, not whether the provisions were payable at a time which might happen before the death of the father; for the nature of the security transaction is, that the father divests himself of his property in favour of his children, whose right accordingly is no longer limited to a personal claim against the father's estate, but is of a similar nature to that of any other creditor holding a real security.

Conveyance in security of obligation, although subsequent in date to the marriage.

1222. This was one of the points decided in the *Clanranald* case,[2] where the husband, by his antenuptial contract, bound himself to pay a certain sum to the children of the marriage, payable six months after his death, subject to a reserved power of division, and granted warrant for infefting the trustees of the settlement in security; and the trustees took infeftment. The estates were disponed to the granter himself and a certain order of heirs, subject to the younger children's provisions. In these circumstances it was held by the whole Court, in an action raised by subsequent creditors of the husband, that the trustees for the younger children were, "in their character as trustees infeft in security, entitled to compete with the diligence of the pursuers, and to rank in their proper order according to their right of preference conferred by their said security."[3] The case is different where a settlement is made after marriage upon a wife. In order that this may be effectual against the claim of creditors to exercise the husband's power of revocation on the ground of donation, the antenuptial obligation must be for a definite annuity or capital sum.[4]

1223. In what has been said respecting the onerosity of marriage-contract provisions, whether resting *in obligatione* or fortified by security, it has been assumed that the father, at the time of granting the provision, was solvent. With respect to provisions to wives, there is authority for the proposition that, even where the

Whether insolvency at the time of granting the security affects the wife's provision.

[1] *Falconer* v. *M'Arthur*, 20 Jan. 1825, 3 Sh. 455, N.E. 317; *Young* v. *Watson*, 2 Dec. 1835, 14 Sh. 85.

[2] *Herries, Farquhar, and Co.* v. *Brown*, 9 March 1838, 16 Sh. 948.

[3] 16 Sh. 982.

[4] See *Champion* v. *Duncan*, 1867, 6 Macph. 17.

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husband is insolvent at the marriage, and the provision is only *in obligatione*, it may notwithstanding be sustained to the extent of what is considered a fair and reasonable provision in the circumstances of the parties.[1] In judging of the reasonableness of the provision, the wife's situation and fortune before marriage are to be taken into consideration.[2] When the wife has obtained security for her provisions, the question of solvency is immaterial, because she is entitled in a competition with creditors to the benefit of her preference.[3]

Provisions to children cut down upon proof of insolvency at the time of granting.

1224. Children do not appear to have any right to their provisions, even when these are made payable before the father's death, if the father is proved to have been insolvent at the time of granting the obligation in their favour, unless their rights are secured by a trust conveyance. If they have been so secured, the children will have the benefit of the security. Thus, where a wife, by postnuptial deed of settlement, conveyed her share of her father's succession to trustees upon trust for the spouses in liferent and the children of the marriage in fee, and the spouses, having become the sole surviving trustees, assigned their right to another party upon trust to recover the succession in question from the trustees of the wife's father, and to invest it in terms of the postnuptial settlement, and the assignation was duly intimated before the husband was declared bankrupt, it was held that the assignation gave the children a preference over the husband's arresting creditors.[4] In a later case, the Court, under very similar circumstances, sustained the children's preferential right to the fee, but found that the liferent, which had been settled to the use of the husband, was subject to the diligence of his creditors, and fell under his sequestration.[5]

Obligation to secure provisions is fulfilled by investing the amount on proper security.

1225. When the husband is bound by the terms of the contract, as he very frequently is, not only to pay the provisions, but also to secure them at the sight of trustees for execution, his obligation is fulfilled by investing the amount upon security of the description required by the settlement. If the obligation is simply to secure the provisions without reference to any specified description of security, his duty is the same as that of a trustee, and will be performed by investing the required sum of money upon heritable

[1] 1 Bell's Com. 7th ed. 683; *Duncan* v. *Sloss*, 1785, M. 987; *Erskine* v. *Carnegie*, 1679, M. 968; *Gartshore* v. *Brand*, 1683, M. 987, 2 Br. Sup. 43; *Watson* v. *Grant's Trs.*, 1874, 1 R. 882.

[2] Bell's Com., *ut supra*; *M'Lachlan* v. *Campbell*, 29 June 1824, 3 Sh. 192, N.E. 132.

[3] *Burden* v. *Smith*, Elch. "Mutual Contract," No. 7; affirmed 1738, 1 Cr. St. & P. 214; and cases of *Morrice* and *Wood*, *infra*.

[4] *Morrice* v. *Sprot*, 27 June 1846, 8 D. 918.

[5] *Wood* v. *Begbie*, 7 June 1850, 12 D. 963.

security.[1] With regard to provisions by way of insurance on the husband's life, it would appear that the obligation to pay the premium is of a similar nature to a personal security. On this subject Professor Bell observes, that "if a policy were opened *in name of the wife and children*, and the premium paid under such antenuptial contract, the benefit of the insurance would not seem to be demandable as part of the husband's estate, while a claim would seem to lie for the future premiums."[2]

Implied reservation of a power to burden an estate with provisions to wife and younger children.

1226. A father, notwithstanding the destination of his estate to the heir of the marriage by antenuptial contract, has been held entitled to grant rational provisions to his wife and younger children, or to increase inadequate provisions if there were no other funds available to him for the purpose.[3] And, on the same principle, it is established[4] that a father whose whole available means has been settled upon the wife and children of a first marriage may encroach upon their interest to the extent of making a moderate provision for the wife and children of a second marriage.[5] It has even been held that, where a husband improvidently settled his estates on the children of the second marriage only, he might burden the heir of the second marriage with rational provisions in favour of the children of the first marriage.[6] In the last of the older series of cases, a provision to a younger son's wife, as a jointure, was sustained, although the estate was previously destined to the heir.[7] Such supplementary provisions must not be so large as virtually to deprive the heir of his right to the estate, but must bear such proportion to the value of the estate as is warranted by the ordinary practice of proprietors in burdening their property for the benefit of younger members of their families. In delivering judgment in the leading case of *Dykes* v. *Dykes*, it was laid down by Lord President Blair, with the approbation of the Court, that a provision to younger children out of the heir's inheritance must be given in the form of a burden on the estate, and not as a specific part of it. The reason is, that a conveyance of land, even when not of greater value than a reasonable pecuniary provision, is a direct displacement of the heir's vested right, which, in the

[1] *Lindsay* v. *Lothian*, 1685, M. 2269; *Hay* v. *Hay*, 1710, M. 12,982; *Kirkland* v. *Her Son*, 1635, M. 2270. See Chapter LXIII., Section V.

[2] 1 Bell's Com. 7th ed. 684.

[3] *Miller* v. *Miller*, 30 July 1822, 1 Sh. (App. Ca.), 308; *Ewing* v. *Ewing*, 1799, M. 12,997; *Ouchterlony* v. *Ouchterlony*, 1752, M. 13,013.

[4] *Haldane* v. *Hutchison*, 1885, 13 R. 179.

[5] See Ersk. 3, 8, 42; *Cunningham* v. *Hathorn*, 20 Dec. 1810, F.C.

[6] See *Bannerman* v. *Bannerman*, 15 Dec. 1801, Hume, 130; and cases in Fraser, *supra*; *Dykes* v. *Dykes*, *infra*.

[7] *Dykes* v. *Dykes*, 9 Feb. 1811, F.C. See Kilkerran, p. 465, on the question what is to be considered a rational provision.

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other case, is affected in a manner less injurious to his interests as proprietor.

Implied power to provide for wife and children of second marriage.

1227. The later cases upon provisions to the children of a second marriage tend to throw some doubt upon the powers of the father to alter the destination of funds settled by an antecedent onerous contract. In the case of *Bell's Trustees* v. *Cowan*,[1] a father had settled his entire estate upon the surviving spouse of the first marriage in liferent, and the children of the marriage in fee. By a *postnuptial* contract he settled an heritable provision upon his second wife, being part of the estate already secured to the children of the first marriage. The Judges of the First Division were equally divided in opinion on the question whether the annuity to the second wife could be sustained to the extent of a reasonable provision. Minutes of debate were ordered with the view of laying the case before the whole Court, but the action was compromised. It was subsequently determined, by a majority of the whole Judges, that, under an antenuptial provision of a fund to the widow of a second marriage in liferent, and the children in fee, the widow was entitled to rank as an onerous creditor on her deceased husband's estate; but that the children had no *jus crediti* in a question with the children of the first marriage claiming legitim, as the provisions in their favour were not made payable at a period which might have arrived before the death of the father.[2] In the case of *Harvey* v. *Wink*[3] the question was raised under circumstances unfavourable to the claim of the beneficiaries under the second contract, as the question here was with creditors, and the provisions were not payable until after the father's death. Here clearly the children had no *jus crediti*; and the averment that they were creditors of their father for their mother's share of the goods in communion was held insufficient to give an onerous character to the dispositions in their favour.[4]

[1] *Bell's Trs.* v. *Cowan*, 21 Nov. 1846, 9 D. 124.

[2] *Wilson's Trs.* v. *Pagan*, 2 July 1856, 18 D. 1097. See also 1 Bell's Com. 7th ed. 687; *Campbell's* case, there referred to; and English authorities stated Chapter LX., Section I.

[3] *Harvie* v. *Wink*, 3 July 1847, 9 D. 1420.

[4] See also *Cumming* v. *Cumming*, 16 July 1858, 20 D. 1280. Here, however, the real competition was between the younger children and the heir.

CHAPTER XXXVII.

ESTATE OF A MARRIED WOMAN.

1. Rights under the Married Women's Property Acts. | 2. Separate Estate in Trust.

SECTION I.

Rights under the Married Women's Property Acts.

1228. The subject pertains to the law of husband and wife, and is only here noticed because it is necessary to a complete view of the law of wife's separate estate. But for this purpose it may be sufficient to note the decided cases on the construction of the Acts, premising that, as to all marriages and all acquisitions subsequent to 18th July 1881, the wife's property and income is separate estate, the husband's proprietary rights being completely excluded.

Whether husband's creditors have claims on the stock.

1229. *Wages and Earnings Act*, 1877 (40 and 41 Vict., cap. 29). —Section 3: "The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman acquired or gained by her after the commencement of this Act in any employment or trade in which she is engaged, or in any business which she carries on under her own name," &c. In the case of *Ferguson's Trustee*[1] an unmarried woman, who carried on the business of a milliner in Glasgow, married in the year 1872, and continued to carry on this business in her own name for *ten years* thereafter without interference by her husband, she defraying the household expenses out of her earnings. In a question between a pointing creditor of the wife (in 1882) and the trustee of the husband's creditors, it was held that the latter had a preferable right to the stock in trade. The ground of the judgment was that the Act of Parliament did not give the wife a right to the stock in trade, but only to "earnings" or profits, and that accordingly the stock passed to the husband by the assignation of marriage. It does not seem to have been considered that the stock in trade of 1872 must have disappeared long before the case came into Court, and that the actual stock was purchased and paid for out of the wife's earnings during the

[1] *Ferguson's Tr.* v. *Willis, Nelson, and Co.*, 1883, 11 R. 261.

marriage. The opinion of Lord Deas, who dissented, seems to the writer to be preferable to that of the majority of the Court; but the question is not likely to arise again, because under the Act of 1881 the stock would remain the wife's property.

Act does not apply to business of husband and wife in partnership.

1230. On the construction of the same section, it has been held that the Act does not contemplate the case of a husband and wife carrying on a business in partnership, and that in such cases the wife is presumed to be the husband's agent.[1] But where a husband and wife carried on separate trades and put their earnings into a joint deposit account, the wife, surviving, was held to be entitled to the half of the deposit.[2] On the 4th section of the same Statute it was held that a wife's obligation to maintain her mother was an "antenuptial debt," for which the husband, by the operation of the Act, was no longer liable.[3]

Policy taken under conditions of the Act may be surrendered.

1231. *Policies of Assurance Act*, 1880 (43 and 44 Vict., cap. 26).—The 2d section provides that "A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children," &c. A husband insured his life for £1000 with a mutual assurance society by a single payment, and two years later, with the wife's consent, proposed to surrender the policy. In a special case between the spouses and the society, in which the power to surrender was questioned, it was held that the trust constituted by the Act of Parliament was not indefeasible, but might be terminated by the joint act of the spouses; the Lord President pointing out that, where an insurance was to be kept up by annual payments, the surrender of the policy might be the only way of avoiding the total loss of the value of the investment.[4]

1232. *Married Women's Property (Scotland) Act*, 1881 (44 and 45 Vict., cap. 47).—The sections to be considered are the first three.

Wife married after date of Act to have separate estate in moveables.

"1. (1.) Where a marriage is contracted after the passing of this Act, and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*.

[1] *M'Ginty* v. *M'Alpine*, 1892, 19 R. 935.

[2] *Morrison* v. *Tawse's Exr.*, 1888, 16 R. 247.

[3] *M'Allan* v. *Alexander*, 1888, 15 R. 863.

[4] *Schumann* v. *Scottish Widows' Fund Society*, 1886, 13 R. 679.

"(2.) Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded: but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate. Income.

"(3.) Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband. Liability to arrestment.

"(4.) Any money, or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. Bankruptcy.

"(5.) Nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage. Contracts of marriage.

"2. Where a marriage is contracted after the passing of this Act the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband. Rents of heritable property to be separate estate in wife.

"3. In the case of marriages which have taken place before the passing of this Act: How far Act to apply to marriages contracted before its passing.

"(1.) The provisions of this Act shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him:

"(2.) In other cases the provisions of this Act shall not apply except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

1233. During the twelve years which have elapsed since the passing of this Act not many legal questions have been raised for decision. Those which relate to the husband's interest in the wife's succession have already been noticed.[1] The only other case of general importance is that of *Scott's Trustee*,[2] in which the Court Husband's interest in the wife's succession.

[1] Chapter VI., Section IV.

[2] *Scott's Tr.* v. *Scott*, 1889, 16 R. 507.

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was called to interpret so much of the 3d section as provides that "In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, *and income thereof*, to which the wife may acquire right after the passing of the Act."

Construction of statutory provision as to income.

In a question between the wife and the trustee on the husband's sequestrated estate, it was held that the words "and income thereof" apply only to the income of heritable estate coming to the wife after the passing of the Act, and do not apply to income accruing after the passing of the Act from heritable estate acquired by the wife before the passing of the Act. The principle of the section is to leave the husband in the unimpaired enjoyment of all the rights which had vested in him before the Act passed, and to give the wife the benefit of the existing law for the protection of her future acquisitions.[1]

Miscellaneous cases under the Statute.

1234. There are three other reported cases under this Statute which raised questions of fact only. In *Miller* v. *Galbraith's Trustees*,[2] it was held that a discharge of legitim by a wife was ineffectual because it was granted without the husband's consent, it being provided by this Act, section 1, that the wife "shall not be entitled, unless with the husband's consent, to dispose of her (heritable or moveable) estate." The other cases relate to the provisions of section 1, sub-section 4, postponing the wife's claim for the value of money or estate lent, entrusted, or immixed, to that of the husband's creditors.[3] In one of these cases the nature of the estate of a married woman under the Statute was stated by the writer as follows:—"The operation and effect of the Married Women's Property Act was not simply to rescind the *jus mariti*, leaving the wife to have the same interest in her estate as an unmarried woman; but the Act gives the wife, by operation of law, what is called a 'separate estate,' a kind of property not known to the common law, and which could only be constituted prior to the date of this Act by means of a trust. The first section, while giving to the wife a separate estate, carefully defines what is meant by that term. We have, in the separate sub-sections, a definition of the separate estate by its various incidents. The wife's powers as to disposal and anticipation of income are limited, and there are special provisions with reference to diligence and bankruptcy.

[1] See Lord Young's observations, 16 R. 509.

[2] *Miller* v. *Galbraith's Trs.*, 1886, 13 R. 764.

[3] *Cochrane* v. *Lamont's Tr.*, 1891, 18 R. 451; *Anderson* v. *Anderson's Tr.*, 1892, 19 R. 684.

Therefore it is in vain to contend that the estate which is here given is the same thing as the estate in moveable property taken by a man or an unmarried woman.[1] "

SECTION II.

Separate Estate in Trust.

1235. Before the passing of the Married Women's Property Act, 1881, there were two well-defined ways of giving protection to wives for their property:—(1) by means of a condition or declaration in a marriage-contract or conveyance excluding the *jus mariti* and right of administration; and (2) by a conveyance of the wife's estate to trustees for purposes defined in the deed of trust.

Jus mariti might be excluded as to particular estate or generally.

1236. I. It was a usual condition of testamentary bequests to married women that the money or estate was given to the wife for her separate use, exclusive of the *jus mariti* of her present or any future husband. Such a condition was and is effectual according to its terms, *i.e.*, if the trustees of the will are directed to retain the estate or fund, the capital will be protected against the acts of the husband and the diligence of his creditors, but will not be protected against the wife's voluntary acts. If the trustees of the will are directed to pay or convey in these terms, they can at most insert the destination in the deed of conveyance, and then the fund is protected against the husband's creditors only so long as it continues to be identifiable as wife's estate.[2] The wife herself might by a suitable clause in her antenuptial contract exclude the *jus mariti* and right of administration, either in relation to specific funds and estate, or in relation to her estate *in genere*—*e.g.*, what she should acquire during the marriage.[3] The decisions referred to below lead by necessary implication to the result that a universal exclusion of the *jus mariti* by antenuptial contract is competent and effectual; but this proposition, which had been doubted by Bell, was not affirmed in terms until the question arose in the City of Glasgow Bank liquidation. The opinion of Lord Deas in *M'Dougall's* case contains an instructive review of all the cases, and may be considered to have closed the chapter of the law of *jus mariti* and its exclusion by contract;[4] the result being in the

[1] 18 R. 455.

[2] Ersk. 1, 6, 14; Bell's Com. 7th ed. 1, 683; *Sandilands* v. *Mercer*, 30 May 1833, 11 Sh. 665; *Murray* v. *Dalrymple*, 1745, M. 5843; *Dickson* v. *Braidfoot*, 1705, M. 10,396; *Gordon* v. *Gordon*, 16 Nov. 1832, 11 Sh. 36 (where the wife's separate estate was held to be assignable without the husband's consent).

[3] *Rollo* v. *Ramsay*, 1832, 11 Sh. 132.

[4] *M'Dougall* v. *City of Glasgow Bank*, 1879, 6 R. 1089; and see *Rollo* v. *Ramsay*, 1832, 11 Sh. 132, and other cases cited in the opinion of Lord Deas.

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particular case identical with what has since been effected by Act of Parliament. But the only real protection against marital influence is by means of a trust, as to which hereafter.

1237. In the present state of the law, a brief reference to authorities regarding the exclusion of the *jus mariti* may suffice.

What terms import an exclusion of the *jus mariti*.

1238. It was held that the right might be renounced[1] or excluded by implication,[2]—*e.g.*, by a destination of estate to "the liferent use" of the lady, or by terms importing that her interest was alimentary; for an alimentary provision, being *sua natura* exclusive of all interests adverse to that of the beneficiary, the use of this term is sufficient evidence of the intention to exclude the claims of the husband and his creditors.[3] Bequests and provisions to a married woman "for her own use,"[4] or prohibiting the husband "to seek the principal sum" during her lifetime,[5] or declaring that the wife shall enjoy the fund "independent of her then or any future husband," [6] or that she shall "choose managers of it," [7] have been sustained as exclusive of the husband's rights. And where the *jus mariti* is expressly renounced or excluded in relation to the rents of heritable estate, the addition of general words, such as an exclusion of "all other right and title," or "debarring the husband from any concern" with the funds, is construed as applicable to the right of administration.[8]

Exclusion of husband's rights in a general conveyance of wife's property.

1239. It seems to have been held at one time that the husband's rights could not be excluded by a universal conveyance even in an antenuptial contract; because, the *jus mariti* being an interest strongly founded in law, it was thought improper that it should be taken away *per aversionem*, or by implication.[9] For this reason, an exclusion of the *jus mariti* in a marriage-contract, proceeding on the narrative that the wife was possessed of personal effects to the extent of £200, was held insufficient to exclude certain furniture, which had not been inventoried, from the diligence of the

[1] See Special Case *Hardy's Trs.*, 1871, 9 Macph. 736.

[2] See the corresponding English cases cited in 1 Wh. & T. 418, 6th ed. 546. No particular words are necessary to the limitation of an estate to the wife's separate use (see Bell's Com. 7th ed. vol. i. 683).

[3] Per Lord Mackenzie in *Black* v. *Pearson*, 9 Feb. 1841, 3 D. 504; *Annand* v. *Chessels*, *infra*.

[4] *Stables* v. *Murray*, 1789, 1 Fraser, 411.

[5] *Humbie* v. *Hume*, 1634, M. 5933.

[6] *Commercial Bank* v. *Black*, 23 June 1842, 14 Jur. 528.

[7] *Hunter* v. *Smith*, 1793, 1 Fraser, 410.

[8] *Keggie* v. *Christie*, 25 May 1815, F.C.; *Gowan* v. *Pursell*, 17 May 1822, 1 Sh. 418. The exclusion, of course, applies to interest as well as to capital; *Robertson* v. *Robertson*, 1835, 13 Sh. 442; *Hutchison* v. *Hutchison's Trs.*, 1842, 4 D. 1399.

[9] And also because the rights of the husband's creditors to attach the estate in his possession for his debts can only be excluded by showing a title to the specific estate in some other person; *Jameson* v. *Strachan*, 27 Jan. 1835, 13 Sh. 318.

husband's creditors;[1] and a general reservation of the wife's right to her separate property was, on the same principle, disregarded.[2] But eventually settlements were sustained excluding the *jus mariti* generally, and as to *acquirenda*.[3] In the case of *Macdonald* v. *Loudoun* a question of this nature was the subject of consideration, in reference to a conveyance of a house and furniture by a third party, executed before the lady's marriage, and "exclusive of the *jus mariti* and right of administration of any husband she may marry." It was held, in a question with a poinding creditor, that a separate estate had been effectually created, rejecting the argument that the husband's possession of the furniture must be presumed to have been in virtue of a right of property.[4] A distinction has been taken, for reasons which are obvious, in relation to corporeal subjects settled by a husband on his wife, and it has been decided that an antenuptial settlement of household furniture and effects[5] by a *husband* to the wife's separate use, excluding his own *jus mariti*, does not, even when accompanied by an inventory of the property,[6] create a separate estate, or even a security in favour of the wife.

Exclusion of husband's rights in relation to *acquirenda*;

and in relation to corporeal moveables.

1240. As the legal assignation of marriage brought under the *jus mariti* the whole of the wife's personal property, except in so far as expressly excluded, no irrevocable separation of interests could be effected by the act of the spouses subsequent to marriage.[7] With respect to property acquired by the wife subsequently to the marriage, it was held that an exclusion of the husband's rights by third parties was effectual, on the principle that the granter might attach such conditions as he pleased to a gratuitous disposition of his property.[8] But if the wife had conveyed her future acquisitions to trustees for the purposes of the marriage, their right could only be excluded by a conveyance in trust for the wife's liferent use, because if the fee be given to a wife exclusive of the *jus mariti*, she retains the power of voluntary disposition, and is therefore

Husband's rights cannot be effectually excluded after marriage.

[1] *Macdonald* v. *Doig*, 1793, M. 5848; see *Greig* v. *Wemyss*, 1670, M. 5832.

[2] *Cuthbertson* v. *Pollock*, 1799, Hume, 206.

[3] *Greenhill* v. *Ford*, 24 June 1824, 3 Sh. 169, N.E. 114; *Hutchison* v. *Hutchison*, 10 June 1842, 4 D. 1399; *Babington* v. *Babington*, 30 June 1840, per Lord Jeffrey, 1 Fraser, 413; *Annand* v. *Scott*, 2 Paton, 369.

[4] *Macdonald* v. *Loudoun*, 26 June 1855, 17 D. 998.

[5] *Darling* v. *Mein*, 20 Dec. 1851, 14 D. 296; *Scott* v. *Price*, 13 May 1837, 15 Sh. 916.

[6] *Campbell* v. *Stewart*, 13 June 1848, 10 D. 1280; *Brown* v. *Fleming*, 19 Dec. 1850, 13 D. 373.

[7] Bell's Prin. § 1942; *Shearer* v. *Christie*, 18 Nov. 1842, 5 D. 132. As to whether such an agreement is binding on the husband *ratione alimentorum*, see *Davidson* v. *Davidson*, 28 March 1867, 5 Macph. 710.

[8] *Annand* v. *Chessels*, 24 March 1775, 2 Pat. 369, affirming M. 5844.

bound to make over the estate to the marriage trustees in fulfilment of her antenuptial obligation.[1]

Effect of exclusion in questions of liability as contributory.

1241. The legal effect of the constitution of a separate estate in the wife underwent a searching examination in the series of cases which arose for decision in the City of Glasgow Bank liquidation. It was there held that the husband was not liable as a contributory for shares which were constituted separate estate of the wife by antenuptial contract,[2] or for shares coming from a third party by gift or contract.[3] Where the stock belonged to the spouses in conjunct fee and liferent, both spouses were held to be liable as partners;[4] and where the stock was taken in the name of the wife, and represented a legacy to her, yet, as the *jus mariti* had not been excluded, it was held to be the husband's property, and that he and not the wife was a contributory.[5]

Constitution of separate estate by conveyance to the wife, or to trustees for her behoof.

1242. II. An estate for the wife's separate use may be constituted by a conveyance to trustees (or to the wife herself in trust), either for her absolute use,[6] or for herself in liferent and her children in fee,[7] or with such other substitutions as may be desired. A conveyance to the husband and wife jointly, for behoof of the wife,[8] or to trustees for her benefit,[9] or to the husband and wife in conjunct fee and liferent,[10] will be equally effectual. It may be observed, however, that in the class of cases in which destinations in conjunct fee and liferent, without restrictive words, have been held to exclude the husband's right of disposal, the interests of the children have very materially affected the rules of construction.[11]

Such trusts are revocable after the dissolution of the marriage.

1243. In the important case of *Torry Anderson*,[12] it was laid down by the consulted Judges that a trust constituted before marriage, and placed beyond the power of recall by the spouses, was highly expedient, and was entitled to the utmost support and protection. An opinion, however, was expressed to the effect that the trust was revocable after the dissolution of the marriage; a view which afterwards received the sanction of the concurring decisions of the Court of Session and the House of Lords in

[1] *Simson's Trs.* v. *Brown* (whole Court), 1890, 17 R. 581; *Douglas' Trs.* v. *Kay's Trs.*, 1879, 7 R. 295.

[2] *Biggart's* case, 1879, 6 R. 470.

[3] *Forbes'* case, 6 R. 1122.

[4] *Wishart's* and *Dalziel's* cases, 6 R. 823.

[5] *Thomas'* case, 6 R. 607. In *Carmichael's* case, 1879, 7 R. 119, and *Steedman's* case, 7 R. 111, where the stock was purchased with the husband's money, the decision was of course the same.

[6] *Young* v. *Loudoun*, 26 June 1855, 17 D. 998.

[7] *Annand* v. *Chessels*, *supra*.

[8] *Gairdners* v. *Royal Bank of Scotland*, 22 June 1815, F.C.

[9] *Balderston* v. *Fulton*, 23 Jan. 1857, 19 D. 293.

[10] *Rollo* v. *Ramsay*, *supra*, p. 683.

[11] See *Fraser* v. *Brown*, 1707, M. 4259; *Mackellar* v. *Marquis*, 4 Dec. 1840, 3 D. 172.

[12] *Anderson* v. *Buchanan*, 1837, 15 Sh. 1073.

Cunninghame v. *M'Leod*.[1] And a reasonable antenuptial contract, by which a minor lady conveyed to trustees a provision which only vested in her on marriage, was found to be valid, and not to be reducible under the Act 1621, cap. 18, at the instance of prior creditors, as a deed granted "without just, true, and necessary cause."[2] Reference is made to another chapter where the question is discussed under what conditions such trusts are revocable during the marriage or after its dissolution.[3] In framing a settlement of the wife's estate, the conveyancer ought to keep in view that the protection which the law accords to such settlements is precisely what the parties have themselves provided. A trust for the wife excluding the *jus mariti* protects the estate from the diligence of the husband's creditors, but leaves the estate subject to the wife's voluntary acts. If the wife's estate is settled on herself in life-rent and the children of the marriage in fee, it is still open to her to assign the liferent.[4] Complete protection can only be given by declaring the liferent alimentary and not assignable.[5]

Separate estate in the law of England.

1244. The distinction between the effect of the usual alimentary clause and the simple exclusion of the *jus mariti* was pointed out by Lord Cottenham in a passage in which the subject is illustrated by comparison with the rules of the law of England.[6] "When first by the law of this country property was settled to the separate use of the wife, equity considered the wife as a *femme sole* to the extent of having a dominion over the property. But then it was found that *that*, though useful and operative so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty, that she, being considered as a *femme sole*, was

[1] *Cunninghame* v. *M'Leod*, 13 Aug. 1846, 5 Bell, 210, affirming 3 D. 1288; where it was also held that an antenuptial contract was revocable in so far as it contained a destination to heirs-general.

[2] *Carphin* v. *Clapperton*, 24 May 1867, 5 Macph. 797.

[3] Chapter XXII., Section III.

[4] *Reliance Assurance Society* v. *Halkett's Factor*, 1891, 18 R. 615.

[5] *Rennie* v. *Ritchie*, April 25, 1845, 4 Bell, 242; *Paterson* v. *Paterson*, 1849, 11 D. 441.

[6] It appears that the English clause restraining anticipation was devised by Lord Thurlow, and introduced into a settlement of property of which he was a trustee; see *Pybus* v. *Smith*, 3 Br. C. C. 340, and Lord Cottenham's remarks in *Rennie* v. *Ritchie*. The condition is valid when annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or for life only; *Baggett* v. *Meux*, 1 Coll. 138, 1 Ph. 627.

Property given to the wife's separate use, subject to restraint upon anticipation, may be alienated by her after the dissolution of the marriage; *Tullett* v. *Armstrong*, 1 Beav. 1, 4 My. & Cr. 377. It was settled, however, in the same case, that although the effect of the restraining clauses is suspended during the period of widowhood, these clauses become again operative in the event of the lady entering into another marriage. A trust for the wife's separate use may, however, be confined to a particular coverture; *Knight* v. *Knight*, 6 Sim. 121; *Benson* v. *Benson*, 6 Sim. 126; *Bradley* v. *Hughes*, 8 Sim. 149.

of course at liberty to dispose of it as a *femme sole* might have disposed of it, and that of course exposing her to the influence of her husband was found to destroy the object of giving her a separate property. Therefore, to meet that, the provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payment actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women. In Scotland much the same course is adopted, the same objects have been worked out, though not precisely in the same way; but still there is, by the law of Scotland, a protection in favour of an alimentary fund, and there is a provision that the alimentary fund shall not be assignable. These are two provisions very much corresponding with the provisions which have been adopted in the law of England."[1]

Effect of payment of income of wife's estate to the husband.

1245. Since the income of a wife's estate, as well as that of the husband, is properly applicable to domestic purposes, it is a natural and usual arrangement that the wife's separate income should be paid into the husband's bank account. In such cases the wife's executor has only a qualified right to an accounting. The law on this subject was thus stated by Lord Watson: "By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bona fide* consumed. The wife's consent to give need not be in writing, nor in express terms, but may be matter of inference from the circumstances of the case or the conduct of the spouses. . . . . There can be no reason why the same circumstances which are in England held to imply donation should be deemed insufficient to sustain a similar inference in the Court of Session."[2]

Miscellaneous cases as to income.

1246. In *Nisbet* v. *Tod*,[3] where a life interest was given to a married lady through trustees, with a power to the trustees to make advances to her out of the capital, it was held that, as there was no special appropriation of the capital, the liferenter was entitled to immediate payment of a share of the fee which would have come to her *aliunde* as one of the truster's next of kin. It has also been determined that a capital sum secured to a lady by marriage-contract "as an alimentary provision for the support" of herself, or of the survivor of the spouses, loses its alimentary

[1] *Rennie* v. *Ritchie*, 4 Bell, 244-5.

[2] *Edward* v. *Cheyne*, 1888, 15 R. (H.L.) 37, at p. 38.

[3] *Nisbet* v. *Tod*, 15 Jan. 1848, 10 D. 361.

character when she becomes a widow; such restrictions on the right of alienation, when contained in marriage-contracts, being supposed to be introduced merely for the purpose of protecting the wife's separate interest during the continuance of the marriage.[1]

Identification of wife's separate estate.

1247. Where the wife's separate estate is vested by contract in her person, there may be difficulty in distinguishing her estate from that of her husband after the dissolution of the marriage, in consequence of changes in the investments. Upon this subject the reader may consult the case of *Cuthill* v. *Burns*,[2] where the Court directed an investigation by an accountant, and being satisfied from his report that two sums of £6000 and £300, which had been deposited in bank in the joint names of the spouses and of the longest liver, were the produce of the wife's separate estate, gave judgment accordingly, the result of sustaining the claim being to carry away the greater part of the succession.

[1] *Martin* v. *Bannatyne*, 8 Mar. 1861, 23 D. 705; see 709.

[2] *Cuthill* v. *Burns*, 20 Mar. 1862, 24 D. 849. See also *Tennent* v. *Tennent's Exr.*, 1889, 16 R. 876, where the principle of *surrogatum* was applied for the protection of the wife's interest in the proceeds of her real estate sold with the husband's concurrence.

CHAPTER XXXVIII.

DISPOSITIONS AND BEQUESTS TO CHILDREN.

1. Description of the Objects (Specified Number: Grandchildren: Illegitimates: Posthumous Children).
2. What Class of Objects in relation to period of Birth are comprehended.
3. Conditional Institution of Children to Parents.
4. Destination-over, as referring to Death without having or without leaving Issue.

SECTION I.

Description of the Objects (Specified Number: Grandchildren: Illegitimates: Posthumous Children).[1]

Erroneous specification of number corrected in accordance with the intention.

1248. Children described as consisting of a Specified Number which differs from the Actual Number.—Of this source of ambiguity an illustration is offered by the case of *Maclehose* v. *Bogle*.[2] The testator conveyed his estates, heritable and moveable, to trustees for uses and purposes comprising certain legacies and a residuary bequest. One of the legacies was thus expressed:—

> "To each of the daughters procreate of the marriage betwixt A. B., merchant in Glasgow, and M. N. K., spouses, Four hundred pounds sterling, . £1200."

All the legacies were written in the same form; the sum bequeathed was engrossed in words in the body of the deed, and the amount was stated in figures in the margin. At the time of executing the testamentary writing there were four daughters, all of whom survived, and it was admitted that the birth of the fourth daughter had been duly notified to the testator. Each of the four daughters was held to be entitled to a legacy of £400, notwithstanding the specification in the will of an aggregate sum corresponding to *three* such legacies.[3]

[1] The question of taking *per capita* or *per stirpes* is considered in Chapter XLII. (Gifts to Heirs, Issue, &c.).

[2] *Maclehose* v. *Bogle*, 28 Feb. 1815, F.C., Hume, 274. This case is clearly distinguishable from *Glanville* v. *Glanville*, 33 L.J. Ch. 317, where a bequest being conceived in favour of "my four nephews and niece, children of my brother R., namely (naming *three* nephews and a niece), it was held that the numeral four was intended to include the niece, and that a fourth nephew of the same family, not named in the bequest, was not entitled to participate. See also Sp. Ca. *Bryce's Tr.*, 1878, 5 R. 723 (5th point).

[3] This decision is also distinguishable from that in *Anderson* v. *Anderson*, 13

In what cases the specified sum is to be divided amongst all the objects, and in what cases to be increased.

1249. The principle being thus established, that a mis-statement of the number of individuals comprised in a specified class does not invalidate the bequest, the application of the principle is merely a matter of interpretation of testamentary language, in illustration of which resort may be had to the decisions of the English Courts of Equity on similar cases. According to the English authorities, where a legacy of so much is given to *each* of a specified number of children, every one of the children in existence at the date of the will is entitled to a legacy equal to what is given, whatever may be their number;[1] but where an aggregate sum is given to be divided amongst the children, the amount of the legacy is not to be increased, but the sum given is to be divided among the actual children.[2] Where the number of children mentioned in the will exceeds the actual number, the legacy is payable without diminution, as in a case where a bequest to the *five* daughters of E. was found to apply to a sole daughter, her brothers, of whom there were five, not being allowed to participate.[3] The circumstance that the testator knows the true number of children does not interfere with the application of the principle.[4] But where a limiting designation is added, which only applies to a certain number of the children corresponding to the number stated in the will, there is no ambiguity admitting of a construction in extension of the meaning of the will;[5] and so, where the number mentioned in the will represents the number of individuals of the family in existence at its date, the bequest will not be extended, on the ground of presumed intention, so as to admit children subsequently born to a participation.[6]

March 1734, 1 Cr. St. & Pat. 136 where it was provided *that in the event* of there being three daughters of a marriage, a certain sum should be paid to them in certain specified proportions, and there being born *four* daughters, the fourth daughter was held to have no right to a share of the provision. In the case stated in the text the discrepancy was the result of a mistake; in fact, in *Anderson's* case, it arose from the testator having failed to provide for a possible contingency.

[1] *Tomkins* v. *Tomkins*, cited 2 Ves. 564, 19 Ves. 126, "To the testator's *three* children £50 each," the actual number being *four; Scott* v. *Fenoulhett*, 1 Cox, 79, "£500 to each of his daughters, if *both* or *either* of them should survive," the actual number being *three; Garvey* v. *Hibbert*, 19 Ves. 125, "To the *three* children of D., £600 each," the number being *four*.

[2] *Stebbing* v. *Walkey*, 2 Br. Ch. Ca. 85, "To the *two* daughters of T., in equal shares," there being *three; Berkeley* v. *Palling*, 1 Russ. 496, residue divided into "eight equal shares," there being only seven disposed of.

[3] *Lord Selsey* v. *Lord Lake*, 1 Beav. 151. But where legacies of £100 a piece were given to *four* sons, and there were three sons and a daughter, the daughter was held to be entitled to a legacy of £100 as well as the sons; *Lane* v. *Green*, 4 De G. & S. 239.

[4] See Hume's report of the case of *Maclehose* v. *Boyle*, p. 275; *Daniell* v. *Daniell*, 3 De G. & S. 337; *Yeats* v. *Yeats*, 16 Beav. 170.

[5] *Wrightson* v. *Calvert*, 1 Johns. & H. 250.

[6] *Sherer* v. *Bishop*, 4 Br. Ch. Ca. 55.

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1250. Curiously enough the case of *one* child is not free from ambiguity. The doubt arises where, in the case of a pecuniary legacy to children of different families, there is added a clause excluding the eldest son of each family who may have succeeded to heritable estate. It was held that such exclusion did not apply to one of the class who was an only child and had inherited landed estate from his father. the clause being only operative *intra familiam.*[1]

Ordinary construction of "children" in a destination.

1251. WHETHER GRANDCHILDREN ARE INCLUDED.—The term children, in the law of Scotland, receives an interpretation corresponding to the natural meaning of the word, and denotes the immediate lawful descendants of the person designated. We have seen that, in association with the term "heir," it is in certain cases construed in a sense synonymous with that term ;[2] but we apprehend there is no instance in which the expression "children" or "bairns," when used alone, has been confined by construction to the eldest son or heir-at-law.[3] The decisions make no distinction between succession in the case of lands[4] and heritable securities,[5] and that of personal property.[6]

Case in which "children" held to include a grandchild.

1252. In connection with this subject, it is desired to call attention to an interesting and unique case, in which the word "children" was held to include grandchildren. The destination (of a house) was to the truster's sister Susan in liferent, for her liferent use allenarly, and to her children in fee ; whom failing, to her sister Margaret, also in liferent, and to her children in fee ; whom failing, to the disponer's nearest heirs whatsoever. Susan, the first liferenter, died unmarried. Margaret, the second liferenter, married; her only child predeceased her, leaving issue, a son, Alexander, and a daughter. As Margaret's liferent was not qualified by the use of the word "allenarly," the fee of the heritable subject vested in her, and the question was, who was her heir of provision, —whether this character belonged to the testator's brother, under the ultimate destination to heirs whomsoever, or whether it belonged to Alexander, Margaret's eldest grandchild, on the assumption that the word "children" in the destination included grandchildren. The Court preferred Alexander, and thereby necessarily extended the meaning of the word children, and the opinions of Lord Deas and the Lord President Inglis, with whom the other Judges con-

[1] *Yeats* v. *Paton*, 1880, 8 R. 172.

[2] Chapter XLII. (Bequests to Heirs, &c.)

[3] *Brown* v. *Brown*, 1680, M. 12,842 and 2375 ; *Grant* v. *Gunn's Trs.*, 28 Feb. 1833, 11 Sh. 484. But see *contra* in a very special case, *Maitland* v. *Maitland*, 15 Jan. 1864, 2 Macph. 417-420, note.

[4] *Herries* v. *Herries*, 1806, Hume, 528 ; *Wilson* v. *Wilson*, 14 June 1811, Hume, 534 ; *Kibble* v. *Stevenson's Trs.*, 16 Feb. 1832, 10 Sh. 341.

[5] *Carnegie* v. *Clark*, 1677, M. 12,840.

[6] *Waddell* v. *Pollock*, 19 June 1828, 6 Sh. 929.

curred, are clear to this effect.[1] It will be observed that as the second named institute was a sister of the disponer, and her children were only conditionally instituted, this was not a case in which the *conditio si sine liberis* could be pleaded.

Grandchildren included under the law of England in certain cases.

1253. The law of England, while coinciding with that of this country in confining the meaning of the term "children" to immediate descendants, admits of a construction of the term, in certain exceptional cases, by which it is made to apply to grandchildren. It is so construed where, at the time of the making of the will, there were no children of the person designated in existence.[2] And where, on this ground, the word children is extended beyond its primary meaning, it will include issue of every degree, unless the terms of the will necessarily confine it to one degree.[3] In such a case construction is necessary to give a meaning to the bequest, and it is reasonable that the word should be so construed rather than that the bequest should fail for want of an object.

Construction of "children" as comprehending issue of the second degree in powers of granting provisions.

1254. The cases in which powers granted to heirs of entail to settle provisions on younger children have been held to be competently exercised in favour of grandchildren are discussed in another part of this work, to which reference is accordingly made.[4] A power to settle an estate upon a younger son cannot be exercised in favour of a grandson, and an obligation to settle estate upon children of a marriage is not fulfilled by giving it to the son of an only daughter, under burden of an annuity to the daughter.[5]

Flexible construction discountenanced in cases to which the condition *si sine liberis* is inapplicable.

1255. The question whether grandchildren, or issue of a deceased child, are comprehended *along with immediate issue* in a bequest in favour of children, can only arise in cases where, in consequence of the legatee being a stranger to the testator, the *conditio si sine liberis decesserit* is inapplicable. It is quite clear that the adoption of such a construction of the term *children* would involve either an extension of the implied condition to a class of cases to which it is in principle inapplicable, or an admission of grandchildren to share *per capita* contrary to the spirit of the bequest. On this principle, in the case of *Rhind's Trustees* v. *Leith*,[6] the Second Division of the Court unanimously refused to construe a bequest to the testator's aunt, and in the event of her death (which happened) to her children, in the sense of admitting the issue of a deceased child to share with the survivors. On this point the

[1] Sp. Ca. *Ranken*, 1878 M. 879.

[2] *Fenn* v. *Death*, 23 Beav. 73.

[3] *Crook* v. *Whitley*, 7 De G. M. & G. 496, per Lord Cranworth; *Pride* v. *Fooks*, 3 De G. & J. 275, per Turner, L.-J.

[4] Chapter LX. (Powers of appointing Provisions), Section II.

[5] *Cunyngham* v. *Cunyngham*, 1777, 2 Pat. 434; *Ormiston* v. *Ormiston*, 24 Jan. 1809, Hume, 531.

[6] *Rhind's Trs.* v. *Leith*, 5 Dec. 1866, 5 Macph. 104; and see *Wishart* v. *Grant*, 1763, M. 2310.

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observation of Lord Cowan is instructive. "In a certain class of cases," he says "the term 'children' has sometimes been construed to include grandchildren, but this has never been held in circumstances similar or analogous to the present. Under the presumed condition, when applicable, grandchildren have taken as coming in place of their parents, but there is no instance of the term 'children' being construed to embrace grandchildren as well as the immediate issue. They may have been held entitled to take as coming in place of their parents *ex presumpta voluntate*, but not as direct legatees; and I think it clear that the grandchildren of Mrs. G. were not called along with her immediate issue. Were this held, they must all be entitled to take *per capita*, which cannot be inferred with any reason to be intended by the testator."[1] Allied to this subject is the question in what cases a provision to children is confined in construction to children of an existing marriage. The cases noted below may be consulted.[2]

"Children," whether comprehending illegitimate issue where there are no lawful children answering the description.

1256. ILLEGITIMATE CHILDREN.—Bequests to the testator's children, or to the children of another person, are uniformly construed as applying solely to lawful children, nor does it appear that in any case a claim has been put forward in our Courts on behalf of illegitimate children, to the benefit of a designative bequest. The mere fact that there were no legitimate children answering the description could scarcely be regarded as a sufficient reason for giving to a designative bequest a construction which would admit persons who in law are regarded as strangers; and it would be necessary to show from expressions in the context, or from other parts of the will, that the bequest was intended to apply to illegitimate children. The reports offer many examples of bequests to illegitimate children by name,[3] and we see no reason to doubt the validity of a designative bequest to all the illegitimate children of an individual in existence at the date of the will, although not named.[4]

Provision to unborn illegitimate children, whether invalid as being *contra bonos mores*.

1257. The validity of a bequest to illegitimate issue, couched in such terms as to include children *nascituri*, is, to say the least, open to serious doubts. No case has yet been presented for decision in the Courts of Scotland, and it is not intended to offer an

[1] 5 Macph. 108.

[2] *Buchan* v. *Porteous*, 1879, 7 R. 211; *Dunlop* v. *M'Crae*, 1884, 11 R. 1104; *Whittet's Trs.* v. *Whittet*, 1892, 19 R. 975.

[3] *Hamilton* v. *De Gares*, 1765, M. 9471; *Smith* v. *Grieve*, 1801, M. "Subs. and Condl. Inst.," App. No. 1; *A.* v. *B.*, 21 May 1816, F.C.; *Martin's Trs.* v. *Milliken*, 24 Dec. 1864, 3 Macph. 326. In *Douglas* v. *Douglas*, 21 Dec. 1843, 6 D. 318, a bequest to a son of £300 in life-rent, and "in the event of his decease without lawful issue," the sum of £50, part thereof, to his reputed daughter, was held by implication to give the legacy to the lawful issue of the son surviving the testatrix.

[4] See *Ballantyne* v. *Dunlop*, 17 Feb. 1814, F.C.

opinion on the point, though we confess that the conception of an immoral tendency seems to us to be applied with little reason to the case of a gift by will, which can neither take effect, nor, in the general case, be known to the mother of the children until it vests by the death of the testator in favour of objects then in existence. Nevertheless, the doctrine of immoral consideration has been unhesitatingly applied by the Courts of Equity in England to such gifts, and their decisions, proceeding as they do upon principles of jurisprudence common to both countries must command a certain degree of authority. In the case of *Howarth* v. *Mills*[1] the principle was applied to a testamentary provision in favour of the issue of a marriage between a man and the sister of his deceased wife. "After the well-known case of *Pratt* v. *Matthew*,"[2] said Wood, V.-C., "the policy of the law, that a man cannot make a legal bequest to the future children of the marriage with his deceased wife's sister, is clearly established. In the present case two classes of children were mentioned by the testatrix, 'legitimate or otherwise,' and to hold that the one could take with the other would be a direct encouragement of an unlawful cohabitation. . . . The case of *Brook* v. *Brook*[3] has decided that a marriage with a deceased wife's sister is not to be regarded with greater favour than any other description of illegitimate connection." The bequest was, however, sustained as a gift in favour of an illegitimate child born before the date of the will, children subsequently born being excluded.

Conditio si sine liberis does not attach to a bequest in favour of illegitimate issue.

1258. Illegitimate children are not entitled to the benefit of the equitable rules which are admitted in the construction of gifts to children. For example, they cannot claim for themselves or their descendants the benefit of the *conditio si sine liberis*.[4] Nor, as it would seem, is a bequest to illegitimate children viewed as a gift to a class, to the effect of securing to the survivors the benefit of accretion irrespective of the terms of the destination.[5] And, under a trust to distribute a fund among poor descendants of the testator, it was held that illegitimate descendants were not entitled to participate.[6] A bond of provision in favour of illegitimate children *in esse* was held to be onerous in a question with creditors.[7]

[1] *Howarth* v. *Mills*, Law Rep. 2 Eq. Ca. 389.

[2] *Pratt* v. *Matthew*, 22 Beav. 328.

[3] *Brook* v. *Brook*, 9 H.L. Ca. 193.

[4] *Earl of Lauderdale* v. *Royle's Exrs.*, 19 May 1830, 8 Sh. 771.

[5] *Torrie* v. *Munsie*, 31 May 1832, 10 Sh. 597.

[6] *Cairnie* v. *Cairnie's Trs.*, 14 Nov. 1837, 16 Sh. 1.

[7] *Ballantyne* v. *Dunlop*, 17 Feb. 1814, F.C. As to the effect of *legitimation* upon such provisions, see *Nasmyth* v. *Connell*, 19 Dec. 1833, 12 Sh. 243, where it was found that the child must elect between the special provision and a prior

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Child *in utero* comprehended for the purpose of enabling it to take a benefit under the will.

1259. Posthumous Children.—To this part of our subject may be referred the doctrine of the Civil Law which has long been received in our system of jurisprudence,—that a child born after the period at which the vesting of a right falls to be determined, but proved by the period of its birth to have been *in utero* at that time, is entitled to the rights of an existing person from the period of its conception. The leading case in the law of Scotland is that of *Mountstewart*,[1] where the question was elaborately discussed, with reference to the rights of a child *in utero* to take as heir of provision in preference to a collateral substitute, and was decided in conformity with the rule of the Civil Law. The fiction of law, which treats the unborn child as actually born, applies only for the purpose of enabling the child to take a benefit to which, if born, it would be entitled; and therefore, where the right of a stranger is conditioned to take effect on the birth of a child within a certain time, the right will not accrue unless the child be actually born within the time limited.[2]

SECTION II.

What Class of Objects in relation to Period of Birth are comprehended.

Statement of the question.

1260. In the case of a designative destination to the children of A., when and in what circumstances is it to be understood as comprehending all the children existing or who may come into existence, and when it is to be confined in construction to the children existing at the period of distribution? In the determination of cases involving this question, much weight is naturally allowed to the element of intention; and the rules which have been established must be regarded rather as guides to the discovery of the intention than as positive canons of construction.

1261. To begin with a simple case: Where a will contains a

provision in favour of all the father's children.

[1] *Lord Mountstewart* v. *Mackenzie*, 1707, M. 14,903; *Grant* v. *Fyffe*, 22 May 1810, F.C. The rule was established in England in the same sense by the decision of Sir J. Leach, V.-C., in *Trower* v. *Butts*, 1 Sim. & S. 181.

[2] *Blasson* v. *Blasson*, 34 L.J. Ch. 18; see Lord Westbury's opinion, which is founded on the limitation of the doctrine in the text of the Civil Law, Dig. lib. 1, tit. 5 (De statu hominum), fr. 7. "Qui in utero est, perinde, ac si in rebus humanis esset, custoditur, quotiens de commodis ipsius partus quæritur: quamquam alii antequam nascatur nequaquam prosit." See also fr. 26 of the same title, and Voet's commentary on the passages. See also *Melrose* v. *Melrose's Trs.*, 1869, 7 M. 1050; *Findlay's Trs.* v. *Findlay*, 1886, 14 R. 169, and Lord Kinnear's observations on the case of *Oliphant*, there cited. The case of *Spalding*, where the claim was for aliment, does not belong to this subject (1874, 2 R. 237).

General rule, that those children alone entitled who are able to take when the succession opens.

gift to the children of A., to take effect at the testator's death, the legacy vests in the children existing at the testator's death, those who may be subsequently born being excluded, because the class is to be ascertained not later than the period of payment.[1] It is perhaps not quite clear on the earlier authorities whether the class is to be numerically ascertained at the period of vesting or at the period of distribution. In the case of *Gregory's Trustees*,[2] the decision of the House of Lords establishes that in the case of a gift to next of kin the class is to be ascertained at the period of vesting, and Lord Watson's observations apply that rule to all cases "where a testator or settlor, in order to define the persons to whom he is making a gift, employs language descriptive of a class."[3] In the case of *Wood* v. *Wood*, a testator provided, with respect to that portion of his estate of which his wife had a liferent under their marriage-contract, that the money was *at her death* to be given "to my nephews and nieces—that is, to the children of my brothers I. W. and P. W.," and he gave his widow a power of apportionment, which she did not exercise. One of the brothers predeceased the testator, leaving issue; the other survived both the testator and his widow, leaving issue, some of whom were born before the death of the liferentrix, and some thereafter. It was held by the Second Division of the Court that the death of the liferentrix was the period appointed for distribution; that the bequest was to be construed as in favour of the children in existence at that period, and that children subsequently born were not entitled to share in the distribution.[4] In this case it is evident that, according to the theory of vesting as now understood, this bequest vested at the testator's death, but it may be that the words printed in italics implied that the class was to be ascertained at the period of distribution, thus displacing the ordinary rule.

Authorities showing that children born

1262. The presumption in favour of children existing at the period of vesting is recognised in the earlier cases on the vesting

[1] *Wood* v. *Wood*, 23 D. 342; *Stopford Blair's Exrs.* v. *Heron Maxwell's Trs.*, 1872, 10 Macph. 760.

[2] *Gregory's Trs.* v. *Alison*, 1889, 16 R. (H.L.) 10; *Buchanan's Trs.* v. *Buchanan*, 1877, 4 R. 754.

[3] 16 R. (H.L.) at p. 14.

[4] *Wood* v. *Wood*, 18 Jan. 1861, 23 D. 338. Under the law of England, also, an immediate gift to children, whether to the children of a deceased person or of a person in life, and whether there be a gift over in case of the decease of any of the children under age or not, comprehends the children living at the testator's death (if any), and those only; 2 Jarman on Wills, 5th ed. 1010, and cases there cited. Where no objects exist at the time of the testator's death, the gift will embrace all the children who may subsequently come into existence, as was held in *Weld* v. *Bradbury*, 2 Vern. 705, in the case of a pecuniary legacy; and more recently, in relation to destinations of residue in *Armitage* v. *Williams*, 27 Beav. 346; and see *Shepherd* v. *Ingram*, Amb. 448; *Genery* v. *Fitzgerald*, Jacob, 468. There appears to be some doubt as to whether the rule applies to the case of a failure of objects at the expiration of a life interest; see the subject discussed in 2 Jarman, p. 1027.

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after succession vests, not entitled to participate.

of designative bequests. Thus, in *Mackenzie* v. *Holte's Legatees*,[1] the destination was to the children of parties named, to be paid upon the expiration of a liferent right, and the judgment of the Court was, that the children alive at the death of the liferentrix were entitled, and it is assumed in the statement of the case that children subsequently born would not participate in the division. In a case reported by Hume,[2] it was held that a legacy given to certain persons *nominatim* as individuals, and "to the children" of another person, embraced the whole children *per capita*, each child alive when the succession opened being entitled to participate with the *nominatim* legatees, and this decision also proceeds on the footing that *post nati* would not be entitled to participate. These decisions were followed by the case of *Grant* v. *Fyffe*,[3] where it was held, on the construction of a designative bequest to children, that a child *in utero* at the opening of the succession was entitled to the same benefit which it would have taken if it had then been born. Had the bequest been regarded as embracing all the children of the family, whether born before or after the period of distribution, there would not have been any necessity for considering the special case of a posthumous child.[4]

Extension of this rule of construction to cases of designative bequests to "issue," "heirs," &c.

1263. The rule according to which the benefit of a designative bequest is confined to persons existing at the period of distribution is not peculiar to designations of "children," but extends to designative bequests to "issue,"[5] to "heirs,"[6] and to collateral relations such as "nephews and nieces;"[7] the principle being, that where a testator directs his estate to be divided amongst a class of objects, he must be understood as designating the individual objects that may be in existence at the period of vesting.

The point does not arise where children instituted in succession to parents.

1264. In cases where children are conditionally instituted in place of their parents, the point does not arise, since after the death of the parents the class, of course, does not increase,[8] and a provision by a testator to his own children is obviously in the same position. Where, in a provision to children, the sum was fixed at £5000 in the event of there being only one child of the marriage, to be increased to £10,000 in case of there being three or more

[1] *Mackenzie* v. *Holte's Legatees*, 1781, M. 6602.

[2] *M'Courtie* v. *Blackie*, 15 Jan. 1812, Hume, 270.

[3] *Grant* v. *Fyffe*, 22 May 1810, F.C.; *Ross* v. *Dunlop*, 1878, 5 R. 833.

[4] See also *Stewart's Trs.* v. *Stewart*, 1868, 7 R. 4; *Whittet's Trs.* v. *Whittet*, 1892, 19 R. 975.

[5] *Macdougall* v. *Macdougall*, 6 Feb. 1866, 4 Macph. 372.

[6] *Pearson* v. *Corrie*, 28 June 1825, 4 Sh. 119, N.E. 120; *Kirkwood* v. *Keeling*, 5 March 1842, 4 D. 878; *Black* v. *Valentine*, 17 Feb. 1844, 6 D. 689.

[7] *Watson* v. *M'Dougall*, 4 June 1856, 18 D. 971; *Wood* v. *Wood*, *supra*; *Douglas* v. *Douglas*, 31 March 1864, 2 Macph. 1008.

[8] *Aitchison* v. *Allan*, 16 Feb. 1831, 9 Sh. 454.

children, subject to the usual conditions of survivorship, and three children were born, only one of whom survived the dissolution of the marriage, it was held that the surviving child was a conditional institute in the larger provision.[1]

Testator may expressly point out the extent of the class in relation to period of birth.

1265. It would appear that where a testator has specifically defined the objects of the class amongst whom the division is to be made, *e.g.*, by directing the fund to be divided at a certain time among the "children surviving at the time,"[2] or among the children or heirs "then living"[3] or "in existence,"[4] or of a particular marriage,[5] such designation is inconsistent with the supposition of a right in the children born after the specified period.[6] And where, in a certain event, it was provided that the residue of the testator's estate should "fall and accrue to the lawful children of J. B., and to the survivor of them, whom failing, to the said J. B. himself," it was considered that the destination must receive a construction consistent with the possibility of the father succeeding on the failure of his children, and the estate was accordingly held to vest in the children in existence at the period of the testator's death.[7]

Where will consistent with supposition of distribution after parent's death, all the children are entitled to participate.

1266. Where no precise period of distribution is prescribed, or where the scheme of disposition is consistent with the supposition of a final distribution after the death of the person to whose children the subject is given, a bequest to "children" may receive a construction comprehending all the children of the person named. This construction will, of course, prevail where the bequest is expressly conceived in favour of children *nascituri*, or "procreated and to be procreated."[8] And wherever the estate is to be liferented by the parent before the children are let into possession, a presumption arises that the legacy is in favour of issue generally, and is not confined to those in existence at the death of the testator.[9]

[1] *Broomfield* v. *Campbell*, 24 Nov. 1835, 14 Sh. 51.

[2] *Rogerson's Trs.* v. *Rogerson*, 10 March 1865, 3 Macph. 684.

[3] *Black* v. *Valentine*, 17 Feb. 1844, 6 D. 689.

[4] *Boyle* v. *Earl of Glasgow's Trs.*, 14 May 1858, 20 D. 925.

[5] *Whittet's Trs.*, 1892, 19 R. 975; and see *Buchan* v. *Porteous*, 1879, 7 R. 211.

[6] *Davidson's Trs.* v. *Davidson*, 9 Macph. 995; *Richardson* v. *Macdougall*, 6 R. (H.L.) 18; *Stopford Blair's Exrs.* v. *Maxwell's Trs.*, 10 Macph. 760; *Ross* v. *Dunlop*, 5 R. 833.

[7] *Biggar's Tr.* v. *Biggar*, 17 Nov. 1858, 21 D. 4; see p. 8, per Lord Colonsay.

[8] *Shaw* v. *Shaw*, 6 Sh. 1149; *Kennedy* v. *Crawford*, 20 July 1841, 3 D. 1266.

[9] *Scheniman* v. *Wilson*, 25 June 1828, 6 Sh. 1016; *Martin's Trs.* v. *Milliken*, and *Carleton* v. *Thomson*, *infra*. The same principle of construction appears to prevail in the law of England. Where, says Jarman (5th ed. vol. ii. p. 1011), a particular estate or interest is carved out with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. And this rule of construction applies equally to limitations of real estate, to direct gifts of personalty, and to executry gifts (by way of conditional institution) in defeasance of a prior gift; 2 Jarman, 1012, citing *Haughton*

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In cases where it is ascertained that there were no children in existence at the death of the testator,[1] or at the execution of the will,[2] the circumstance constitutes a strong argument in favour of the claims of children *nascituri;* and as it is an improbable supposition that a testator should propose to make a *selection* from a class of persons which was not in existence at the time of making his will, the inference has been drawn in such cases that all the children of the person named, at whatever time born, are intended to share in the distribution.[3] But it is not on this account to be supposed that the vesting of the fee remains in suspense until the death of the parent. It may be that it is suspended by reason of some contingency in the destination,—*e.g.*, by a provision of survivorship. But the mere circumstance of a right being given which extends to children who may be thereafter born will not prevent the succession from vesting in the objects of the class who are in existence. In such cases, where the legal estate is given to trustees, each child is held to take a vested interest in the estate at birth, subject to be diminished by the emerging claims of children subsequently born,[4] and where the settlement is in the form of a direct conveyance to the beneficiaries, the *nominatim* fiar, or the liferenter, as the case may be, takes a fiduciary fee for behoof of the objects of the class, according to rules which were previously explained.[5]

Vesting of children's interest not affected by parent repudiating the will.

1267. The circumstance that a parent to whom a liferent interest in a provision is given repudiates the provision, and claims legitim in place of it, does not affect the vesting of the gift of the fee in the children. Their interests are precisely what they would have been if the gift of the liferent had been accepted.[6]

How the foregoing rules are affected by the operation of the doctrine of survivorship.

1268. Referring to the chapters on the subjects of survivorship and the vesting of testamentary provisions, it is only necessary here to point out the application of the preceding rules to cases in which the vesting of children's provisions is contingent on survivorship or on some other element of contingency.

Marriage-contract provision *in obligatione.*

1269. (1.) Where the destination is contained in a contract of marriage which makes provision for the children of the marriage, but without setting apart a fund in the granter's lifetime, the

v. *Harrison*, 2 Atk. 329; *Ellison* v. *Airey*, 1 Ves. sen. 111; and *Baldwin* v. *Rogers*, 3 D. M. & G. 649.

[1] *Martin's Trs.* v. *Milliken*, 24 Dec. 1864, 3 Macph. 326; *Scott* v. *Scott*, 7 Feb. 1843, 5 D. 520.

[2] *Carleton* v. *Thomson*, 3 Macph. 514, 30 July 1867, 5 Macph. (H.L). 151; L.R. 1 Sc. App. 232.

[3] 3 D. 1271, per Lord Fullerton.

[4] *Carleton* v. *Thomson*, *supra;* and see Lord Jeffrey's observations in *Calder* v. *Dickson*, 4 D. 1365, note.

[5] *Macgowan* v. *Robb*, 29 March 1864, 2 Macph. 943; and cases cited, Chapter XXXIII., Section II.

[6] *Ewan* v. *Watt*, 10 July 1828, 6 Sh. 1125; *Dixon* v. *Fisher*, 10 Sh. 55; 1 July 1833, 6 W. & S. 431.

provision vests in the children surviving at the dissolution of the marriage.[1]

Marriage-contract provisions secured.

1270. (2.) Where marriage-contract provisions are secured to the children, either by a direct conveyance to the parent or parents in liferent, for his or their liferent use only, and to the children in fee, or by a conveyance to trustees in trust for the children of the marriage, each child takes a vested interest at birth, subject to diminution upon the birth of other children.[2]

Bequest for immediate distribution.

1271. (3.) In the case of a bequest to the children of a person named, where the distribution is immediate, and no intention is expressed to include objects born after the death of the testator, the legacy vests in the surviving children at the death of the testator to the exclusion of those previously deceased or subsequently born.[3]

Provision of fee to the children of a liferenter.

1272. (4.) Where a liferent is given to the parent, and the destination to the children is not contingent on survivorship, the legacy vests *a morte testatoris* in the objects surviving the testator,[4] but subject to a claim of participation on the part of children who may subsequently come into existence,[5] assuming that there is no expression of an intention to exclude them.[6]

Effect of power of division given to parent.

1273. (5.) A power of division given to the parent does not prevent the fund from vesting in his lifetime;[7] on the contrary, the parent, if he exercises the power, must allot a share to the representatives of a child previously deceased.[8]

Provision limited to children surviving the parent.

1274. (6.) Where the legacy is to children surviving at the death of a parent to whom a liferent is given, the fund will vest in the children surviving the liferenter, whether born before or after

[1] *Falconer* v. *M'Arthur*, 20 Jan. 1825, 3 Sh. 455, N.E. 317; *Brodie's Trs.* v. *Mowbray's Trs.*, 12 Nov. 1840, 3 D. 32; *Grant's Tr.* v. *Anderson's Tr.*, 1 Feb. 1866, 4 Macph. 336; and see *Rogerson's Trs.* v. *Rogerson*, 10 March 1865, 3 Macph. 684.

[2] *Beattie's Trs.* v. *Cooper's Trs.*, 14 Feb. 1862, 24 D. 519, and cases there cited; *Romanes* v. *Riddell*, 13 Jan. 1865, 3 Macph. 348; *Sivright* v. *Dallas*, 27 Jan. 1824, 2 Sh. 643, N.E. 543, and F.C.

[3] *Mackenzie* v. *Holte's Legatees*, 1781, M. 6602, and other cases cited *supra*, § 1262; *Fyffe* v. *Kerr*, 13 July 1841, 3 D. 1205; *Rhind's Trs.* v. *Leith*, 5 Dec. 1866, 5 Macph. 104.

[4] *Forbes* v. *Luckie*, 26 Jan. 1838, 16 Sh. 374; *Ewan* v. *Watt*, 10 July 1828, 6 Sh. 1125.

[5] *Calder* v. *Dickson*, 4 D. 1365, per Lord Jeffrey; *Baillie* v. *Seton*, 16 D. 220, Lord Rutherfurd's note; *Hunter's Trs.* v. *Carleton*, 3 Macph. 520, per Lord Curriehill. But it must be remembered that this construction does not apply to the case of a fee given to children under burden of a liferent to a stranger; see *Wood* v. *Wood*, 23 D. 338; *Watson* v. *M'Dougall*, 18 D. 971, and observations *supra*, § 1261 *et seq.*

[6] *Watson* v. *Marjoribanks*, 17 Feb. 1837, 15 Sh. 586. Here the destination was to the children, or "such of them as shall survive me," an expression which implied a definitive vesting of the fee at the death of the testator.

[7] *Sivright* v. *Dallas*, 27 Jan. 1824, F.C., 2 Sh. 643, N.E. 543. But an absolute power of disposal in the parent is incompatible with the immediate vesting of the fee; *Robertson* v. *Houston*, 28 May 1858, 20 D. 989, and Lord Curriehill's observations, p. 994.

[8] *Watson* v. *Marjoribanks*, 17 Feb. 1837, 15 Sh. 586.

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the testator's death;[1] and the same rule has been applied to the case of a gift followed by a destination-over conditioned to take effect on the death of the parent without leaving issue.[2]

Effect of condition making provision payable at majority.

1275. (7.) The circumstance of the legacy being made payable to the children at majority, if it necessitates a postponement of the distribution to a period subsequent to the death of the testator, argues an intention to include children born after his decease.[3]

Where no children in existence at testator's death, provision held to apply to children *nascituri*.

1276. In conclusion, where there are no objects answering the designation at the death of the testator, but a possibility of children being born, the provision is considered to be in favour of children *nascituri*, and the trust must be kept up during the lifetime of the parent to await the event of the birth of issue.[4] Where there was no probable expectation of issue, the Court has authorised the payment of the interest of the fund to a conditional institute, on caution to repeat in the event of issue of the designated class coming into existence.[5] And where a legacy is given to all the children of a person named, and from the age of the mother there is no prospect of any addition being made to the family, the children in existence (and in whom, as we have seen, a right is vested) are entitled to payment on finding security, or, if the Court think fit, upon a personal undertaking to account to children who may be born after the distribution of the estate.[6]

In such cases the income falls to be

1277. With respect to the destination of the intermediate income of the subject of the bequest, where there are no objects in

[1] *Johnston* v. *Johnston*, 9 June 1840, 2 D. 1038.

[2] *Thomson* v. *Scougall*, 12 Sh. 910; 31 Aug. 1835, 2 S. & M'L. 305; *Proven* v. *Proven*, 14 Jan. 1840, 2 D. 298; *Balfour* v. *Balfour*, 20 Jan. 1864, 2 Macph. 467.

[3] *Scheniman* v. *Wilson*, 25 June 1828, 6 Sh. 1019; *Shaw* v. *Shaw*, 6 Sh. 1149; *Kennedy* v. *Crawford*, 20 July 1841, 3 D. 1266. The condition of payment at majority has been held not inconsistent with vesting in the class; *Maitland* v. *M'Dermaid*, 23 D. 726; see also *Matthew* v. *Scott*, 21 Feb. 1844, 6 D. 718. In England the old rule was, that wherever the period of distribution was postponed until the attainment of a given age by the children, the gift would apply to those who were living at the death of the testator, or who might come into existence before the first child attained that age; but the tendency of the later decisions appears to be in favour of including all the children who attain the age, and this construction generally prevails in the case of destinations containing other elements of contingency; 2 Jarman on Wills, 5th ed. 1015-23.

[4] *Scott* v. *Scott*, 7 Feb. 1843, 5 D. 520; *Martin's Trs* v. *Milliken*, 24 Dec. 1864, 3 M. 326.

[5] *Blackwood* v. *Blackwood's Trs.*, 11 June 1833, 11 Sh. 699. This judgment, for which it is difficult to find a principle, was not allowed to pass without an energetic protest on the part of Lord Meadowbank, who declared that the Court had as much right to order the money to be paid to the clerk at the table as to a person in whom no right had legally vested. His Lordship observed, with reference to *Scheniman's* case, that the person to whose issue the legacy was given was a female, and after a certain age it was certain there could be no issue; but that as to a male there was no such rule.

[6] *Scheniman* v. *Wilson*, 25 June 1858, 6 Sh. 1019; *Shaw* v. *Shaw*, 6 Sh. 1149.

existence at the period of distribution,[1] it is now settled that, in the absence of any special destination, the income follows the principal and falls to be accumulated for the purposes of the trust.[2] The case of *Pursell* v. *Newbigging*, in which this doctrine was established, applies to heritable estate as well as to the residue of personalty.[3] Questions of this kind cannot often occur in relation to bequests to children, seeing that the interest of the fund is usually given to one of the parents at whose death the money or subject vests in possession.[4]

Accumulated with the principal.

SECTION III.

Conditional Institution of Children to Parents (whether the Right is contingent on Survivance of the Period of Distribution).

1278. Clauses of conditional institution of children or issue, on the failure of the parents, have given rise to two interesting general questions. One of these—the question whether, or in what circumstances, issue can be admitted to participate under a clause of survivorship—is discussed in a previous chapter, treating of

Statement of the question.

[1] Upon a cognate question, *i.e.*, the destination of the income accruing in the interval between the births of the eldest and the youngest child (where the parent has not a life interest), there does not appear to be any distinct authority in the law of Scotland. In England it was ruled, in an early case (and the decision is clearly correct in principle), that the children in existence take the whole; those subsequently born not being entitled to share in the bygone income; *Shepherd* v. *Ingram*, Amb. 448. The rule is also recognised in *Scott* v. *E. of Scarborough*, 1 Beav. 154; *Mainwaring* v. *Beevor*, 8 Hare, 44; *Ellis* v. *Maxwell*, 12 Beav. 104.

[2] *Pursell* v. *Elder*, 24 March 1865, 4 Macq. 992, and case of *Genery* v. *Fitzgerald*, Jacob, 468, there cited; *Scott* v. *Scott*, *supra*. The interlocutor bears that the trustees, having been directed "to invest and hold the fee of one-half of the residue for behoof of certain parties, who are described as the heirs of the bodies of E. H. and T. H., whom failing, the substitutes mentioned in the settlement, . . . and these parties not being at present in existence, and their existence being still a matter of contingency, the said half of the funds . . . ought in the meanwhile to be retained and held by the trustees for behoof of such parties in the event of their existence;" 5 D. 529.

[3] Lord Westbury's judgment, however, is partly founded on the circumstance that the real and personal estates were blended into one mass, and were therefore (as in most questions on the distribution of mixed estate) subject to the same rules as a residue composed exclusively of personalty. See the judgment, 4 Macq. 993. In the law of England, it would seem that the intermediate rents of real estate devised separately from the personalty would devolve to the heir-at-law; 2 Jarman, 5th ed. 1025.

[4] In the case of *Edmunds* v. *Waugh*, L.R. 1 Eq. 418, the income of a fund bequeathed to certain children, and payable at majority, accruing prior to the birth of a child, was held to fall into residue. The income accruing during the period of minority vested in the child under the terms of the will.

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clauses of survivorship. The other is the question stated in the title of this section.

Whether the right of issue succeeding as conditional institutes may vest, while that of the co-legatees is suspended.

1279. Questions of the vesting of family provisions arising in the Courts of Scotland are usually, and perhaps too exclusively, considered with reference to the question *at what time* the right vests under the terms of the provision. The possibility that the interests of different members of a family, taking under the same provision, may vest at different times, or that one member may take a vested right while the interest of the others is contingent, appears to have escaped attention. Yet, on principle, it seems clear that, where the vesting is suspended solely in consequence of a clause of survivorship or other contingent destination, if the contingency ceases with respect to one of the shares of the provision, the right to that share ought to vest, although, as regards other shares, the vesting may be suspended. Such a case may arise under the common destination to a plurality of persons or the survivors of them (at the expiration of a liferent), and to the children of such as may die leaving issue. Here, it will be observed, the condition of survivorship does not apply to the gift in favour of the children of the deceasing legatees, but only to the gift to the original or first instituted legatees. Under such a form of destination there is no element of contingency to prevent the children of an original legatee from acquiring a vested interest at his death in his original share; and there is no reason for postponing the claims of children then existing to the date of the death of the liferenter. It is remarkable that this point should not have been raised in our Courts, while in England it has given rise to conflicting decisions. The point is settled in favour of the theory of immediate vesting by a judgment of the House of Lords.

Question determined in the affirmative by the House of Lords in *Martin* v. *Holgate*.

1280. This is the case of *Martin* v. *Holgate*,[1] in which an appeal was taken for the purpose of obtaining an authoritative decision on the principle of the question which has been stated, the authorities on either side being numerous and nearly equally balanced. The question related to the vesting of the residue of a trust-estate under the following destination,—"And as to the rest, residue, and remainder of my said trust-estate and effects, in trust to pay over the annual proceeds thereof unto my dear wife, S. J., for and during the term of her natural life; and from and immediately after her decease, *to distribute and divide* the whole of my said residuary estate and effects unto and among such of my four nephews and nieces (naming them) *as shall be living* at the time of her decease, in equal shares and proportions as tenants in common, and not as joint tenants; but if any or either of them *should then be dead leav-*

[1] *Martin* v. *Holgate*, 1 June 1866, 1 Law Rep. Eng. App. p. 175.

ing issue, then it is my will and meaning that such issue shall be entitled to their father's or mother's share, but in equal proportions." Three of the nephews died in the lifetime of the testator's widow, the tenant for life, two of them without ever having had a child, one of them leaving a daughter. This daughter likewise died before the widow, and the question was, whether her personal representative was entitled to a share in the distribution, on the footing that she took a vested interest by survivance of her parent. Lord Romilly held that she did not take a vested interest, but recommended an appeal to settle the conflicting decisions on the question; and, on appeal, the Lords were unanimously of opinion that the order of the Master of the Rolls should be reversed. The *ratio* of the ultimate decision appears to be applicable to destinations in trust-settlements in the Scotch form.

Opinions of the Law Lords.

1281. Lord Cranworth, after alluding to the argument which was maintained on the special terms of the will, "if any of them should *then* be dead," which were supposed to have reference to the period of distribution observed that the inference deduced from this expression was "encountered by another rule, namely, that we are never to construe a gift as contingent unless the context requires us to do so, and it is very difficult to say that in this case there is any such necessity. When we speak of a person having died leaving a child or children, we mean leaving a child or children at his death; . . . and if that be so, it is hard to say that any difference is to arise from the circumstance that the words are not 'shall then *have died* leaving issue,' but 'shall then *be dead* leaving issue.'" The authorities being equally balanced, his Lordship moved the House to declare that the child took a vested interest.[1] Lord Chelmsford was of the same opinion. He observed: "The Master of the Rolls says, 'The testator did not intend by these expressions to substitute a dead person for a dead person.' But, with submission to his Lordship, this is not the correct mode of dealing with the question. It does not appear that the testator had at all contemplated the event of the death of a child surviving a nephew or niece, and dying in the lifetime of the tenant for life; and therefore he made no provision for it. . . . The words 'leaving issue' must necessarily apply to the period of the death of the nephews or nieces, and not to the death of the tenant for life; because it forms part of the compound events connected with the nephews and nieces, upon the happening of which the gift to the children is to take effect." [2]

1282. Lord Westbury's opinion also proceeds upon principles of construction which are of general application, and in no way pecu-

[1] 1 Law Rep. Eng. App. 185. [2] *Id.* p. 187.

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liar to the jurisprudence of England. He says, "The testator bequeaths his residuary estate to his wife for life, and then to such of his nephews and nieces as should be living at the death of the tenant for life. This form of gift is contingent, and vests in such of the nephews and nieces as shall be living when the tenant for life dies. To this bequest the testator adds another, in favour of the issue left by any nephew or niece who may predecease the tenant for life. This last is an independent bequest. . . . According to its plain effect and meaning, unless that meaning be altered by the implication of additional words, the issue living at the death of a nephew or niece, who may predecease the tenant for life, take an immediate vested interest in that share which would have been taken by the parent, if he or she had been living at the time of distribution. The interest of the issue is vested and immediate, although the amount of the share is uncertain until the death of the tenant for life."[1]

SECTION IV.

Destination-over, as referring to Death without *having* or without *leaving* Issue.

Die "without issue," equivalent to without having had a child.

1283. The question to be considered is, whether a destination-over, in the event of the liferenter or prior legatee *dying without issue*, means without having had or without leaving a child? In its primary meaning the expression die "without issue" appears to be synonymous with childless, and to refer to the contingency of death without ever having had a child; and this meaning is the more readily to be ascribed to it by reason of the elliptical nature of the expression, and because the settlor or testator, by the omission of the word "leaving," which is generally employed in such provisions, may be supposed to have intended a corresponding change in the sense of the clause.

Examples of this construction. Marriage-contract cases.

1284. In marriage-contract provisions, where the presumption always is in favour of immediate vesting, this is accordingly to be considered the proper construction of the term; so that, if a fund be provided to the wife in liferent, and to the children of the marriage in fee, and in case of her death without issue then over, the fee vests in the children of the marriage at the period of birth, and the conditional institution only takes effect in the event of the marriage being dissolved without the birth of a child.[2] The same

[1] 1 Law Rep. Eng. App. 188.

[2] See opinions in *Romanes* v. *Riddell*, 3 Macph. 353; and *Rogerson's Trs.* v. *Rogerson*, 3 Macph. 690; *Beattie's Trs.* v. *Cooper's Trs.*, 14 Feb. 1862, 24 D. 519.

construction has been put upon a clause of conditional institution in a testamentary settlement, in the absence of other elements having a tendency to keep the vesting in suspense during the existence of the life interest.[1] The provision was primarily in favour of the testator's daughter in liferent, and of her children in fee, with a destination-over to nieces. At the father's death the daughter had two children, and five were subsequently born to her. The succession was held to vest in the children at birth.

Will cases.

1285. With this decision it is difficult to reconcile an earlier case,[2] where the circumstances were precisely similar, the destination being contained in a will, and being in favour of the truster's daughters, and their or her issue in fee, "and in case any of the said daughters shall decease without issue," to the survivors. In this case it was found that the provision of survivorship "is not to be understood as applying only to the case of any of the daughters predeceasing the truster, but as applicable to the case of any of them dying without children *quandocunque*."[3] Perhaps a distinction may be found in the circumstance of the ulterior gift in the case of *Dennistoun* being of the nature of a right of survivorship; for as in that case the gift over would take effect at the death of the daughters by whom the estate was liferented, it might naturally be inferred that it was intended to apply to the event of the failure of issue before that time *from any cause,—i.e.*, either by the non-existence of issue, or by the death of those who should have come into existence.[4]

Whether conditional institution of children is implied from a destination-over applicable to the event of failure of issue.

1286. A legacy to a person in liferent, and in fee to the testator's next of kin in the event of the liferenter's "decease without lawful issue," was, in the case of *Douglas* v. *Douglas*, held to imply a conditional institution of the children of the liferenter in the event of his dying leaving issue surviving him.[5] A somewhat different principle of interpretation was recognised in the case of *L'Amy* v. *Nicolson's Trustees*,[6] where a declaration that in the event of the truster's residuary legatees, or either of them, "*having* no children, or having children who shall not *survive* their parent," then his or

[1] *Carleton* v. *Thomson*, 3 Macph. 514; July 1867, Law Rep. 1 Sc. App. 232, 5 Macph. (H.L.) 151. The expression, "in the event of her decease without issue of her body," implies that if there be issue the fee vests at birth; per Lord President Inglis in *Cunningham* v. *Cunningham*, 1889, 17 R. 218, at p. 222.

[2] *Dennistoun* v. *Dalgleish*, 22 Nov. 1838, 1 D. 69.

[3] Interlocutor, 1 D. 72-3.

[4] In the case of *Kennedy* v. *Crawford*, 20 July 1841, 3 D. 1266, a destination to a class of children, subject to an annuity to their father, "and failing any of them by death *without lawful children*, to the survivors," was held to vest at the death of the father, as the period when the class would be complete. Here, therefore, the words were impliedly read as equivalent to "without *leaving* issue."

[5] *Douglas* v. *Douglas*, 21 Dec. 1843, 6 D. 318.

[6] *L'Amy* v. *Nicolson's Trs.*, 5 Dec. 1850, 13 D. 240.

her interest should be limited to the liferent enjoyment of the money, was held not to have the effect of preventing the acquisition of a vested interest by one of the residuary legatees who had children at the time. In this case there was no prior life interest necessitating a suspension of payment.

Words "without leaving issue" include failure by non-existence as well as by death.

1287. Clauses referring to the death of a legatee *without leaving issue* obviously apply to failure either by non-existence or by death before the period of vesting,[1] and the only questions that can arise upon the construction of such clauses are questions which have relation to the period within which the failure must take place in order to entitle the conditional institute to take under the destination.[2] But in a case where the words of destination were, "and failing the said E. M., and children of the said J. M., *by death* before the said J. M.," it was observed that the destination introduced by these words would not take effect in the event of the *non-existence* of children of the person designated.[3]

[1] The words "failing children" obviously include the case of a failure by death as well as by non-existence; *Romanes* v. *Riddell*, 13 Jan. 1865, 3 Macph. 348 (see the destination, p. 349); *Grant's Tr.* v. *Anderson's Tr.*, 1 Feb. 1866, 4 Macph. 336; *Wright* v. *Ogilvie*, 9 July 1840, 2 D. 1357, 1358.

[2] The chief difficulty occurs where the period of payment is arbitrarily postponed, *e.g.*, without a life interest being given to the person on whose death the payment is to take place, as in *Ferrie* v. *Ferrie*, 23 Feb. 1849, 11 D. 704, and *Balfour* v. *Balfour*, 20 Jan. 1864, 2 Macph. 467.

[3] *Martin's Trs.* v. *Milliken*, 3 Macph. 332, per Lord J.-C. Inglis.

CHAPTER XXXIX.

OF THE "*CONDITIO SI INSTITUTUS SINE LIBERIS DECESSERIT.*"

1. Parental Provision, how defined.
2. Relationship of the Institute to the Truster or Donor.
3. Exclusion of the application of the Conditio.
4. Application of the Conditio to Grandchildren and to Heirs-at-Law.
5. Whether its operation is confined to Testamentary Provisions.

SECTION I.

"Parental Provision," how defined.

Conditio si institutus sine liberis decesserit confined to parental provisions.

1288. Where a legacy is given by a parent to a child or a grandchild, or to persons to whom he stands *in loco parentis*, without mention of the legatee's heirs, a presumption arises that the testator had overlooked the contingency of the death of the legatee leaving issue; and that, if he had contemplated that event, he would have made provision for it by substituting the children of the legatee to their parent. On this ground, equity holds the ulterior right of the residuary legatee,[1] or of the conditional institute to whom the legacy may be given over,[2] to be qualified by the implied condition, *si institutus sine liberis décesserit*.[3] The same condition applies to the eventual right of succession of the testator's personal representatives, failing a residuary clause or other ulterior destination.[4] The presumption against the intentional exclusion of the testator's descendants, although not absolute, is very strong. In the case of destinations to collateral relatives, as brothers and sisters, or nephews and nieces, the presumption is weaker; and the condition does not apply at all to legacies in favour of cousins

[1] *Wilkie* v. *Jackson*, 9 July 1836, 14 Sh. 1121, and cases cited *infra*, *passim*.

[2] *Wood* v. *Aitchison*, 1789, M. 13,043; *Glendinning* v. *Walker*, 30 Nov. 1825, 4 Sh. 237, N.E. 241.

[3] See the texts of the Civil Law on which this doctrine is founded, viz., Cod. lib. 6, tit. 25, l. 6 (De Inst. et Subst.); Cod. lib. 6, tit. 42, l. 30 (De fideicom.); Dig. lib. 35, tit. 1, fr. 102 (De Cond. et Demonstr.).

[4] Bell's Prin. §§ 1776, 1989; Ersk. 3, 8, 46, and Ivory's note, p. 825; *Dixon* v. *Dixon*, *infra*.

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or remoter relatives, to whom the testator did not stand *in loco parentis*.[1]

Judicial definitions of a parental provision.

1289. The *conditio si sine liberis decesserit* applies only to family provisions in favour of children or persons to whom the testator has placed himself *in loco parentis*. This definition excludes bequests of corporeal moveables,[2] and perhaps all other specific legacies.[3] There ought also to be excluded pecuniary legacies to members of a family who receive shares of residue; but it cannot be said that the decisions on this last point are uniform or consistent. The latest exposition of the subject will be found in the case of *Allan* v. *Thomson's Trustees;* and this decision, following on the important and well considered case of *Douglas' Executors*, ought to settle the principle, if anything can be held settled in this branch of the law.[4] As to what constitutes a parental provision, the best and clearest explanation is that of Lord President Inglis in the case of *Bogie's Trustees*.[5] The expression, *in loco parentis*, his Lordship said, "does not mean that the uncle has during his life occupied such a position, or treated his nephews and nieces with that kindness which a parent would show to his children; what is meant is, that in his settlement he has placed himself in a position like that of a parent towards the legatees—that is to say, that he has made a settlement in their favour similar to what a parent might have been presumed to make. It was argued that there could be nothing like an assumption of the parental character by an uncle or aunt, unless his or her settlement embraced as beneficiaries the whole class of nephews or nieces he or she had. As regards principle, I do not see how that can be maintained. Surely, if the testatrix puts herself *in loco parentis* towards a certain class by means of her settlement—and it is by her settlement alone that she can do so—then, when the class has once been selected which is to enjoy her property after her death, that class is the class towards which the testatrix assumes the character of a parent." Lord Moncreiff, in the important case of *Blair's Executors*, thus states the principle and its qualifications: "The *conditio* has been held to apply where the settlement is universal, where the beneficiaries are a class, and the provision is of the nature of a family settlement, and where the testator, if not a parent, is at all events *in loco parentis* to the beneficiaries. Where all these elements concur, the *conditio* will be applied. The effect given to these

[1] Section III., *infra*.

[2] Special Case *Wauchope*, 1882, 10 R. 441; Special Case *M'Alpine*, 1883, 10 R. 837.

[3] *Crichton's Trs.* v. *Howat's Tutor*, 1890, 18 R. 260.

[4] Special Case *Douglas' Exrs.*, 1869, 7 Macph. 504; *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733.

[5] *Bogie's Trs.* v. *Christie*, 1882, 9 R. 453, at page 456.

elements depends on two principles,—first, that the *delectus personæ* implied in a *nominatim* bequest is excluded when the provision is to a class: and, secondly, that when the provision is of the nature of a family provision, and where the granter is *in loco parentis* to the beneficiaries, there is a presumption that the granter prefers the issue of a predeceasing beneficiary to any substitute named in the deed."[1]

SECTION II.

Relationship of the Institute to the Testator or Donor.

Reason of the implied condition, and extent of its application.

1290. With one or two inconsiderable exceptions, these distinctions will be found to be consistently maintained in the numerous decisions on this interesting doctrine of our jurisprudence. Provisions to children or grandchildren are presumed to spring from the *pietas paterna*, and are supposed to be intended for the benefit of the grantee's family. Equity accordingly implies in such provisions an institution of descendants, whether the class of legatees includes the whole of the testator's existing issue or selected individuals. The ordinary case is that of a bequest of the testator's property to his children as a class. Here there is no room for dispute as to the applicability of the condition, apart from expressed intention; the question being always open, whether the exclusion of issue was not intentional.[2]

Condition held to qualify bequest to an individual child of the testator, as well as bequest to children collectively.

1291. Bequests to individual children of the testator are held to be of the nature of family provisions. Thus in *Dixon* v. *Dixon*[3] the testator left the residue of his succession, heritable and moveable, to his eldest son, who had a family at the date of the settlement; and the son having predeceased the testator, the Court sustained a claim on the part of his children to the entire residue, in preference to that of the testator's other children, to whom general legacies had been bequeathed. In *Wilkie* v. *Jackson*,[4] provisions to the testator's daughters, which had been made burdens on their brother's share of the succession, were held to be operative in favour of the children of predeceasing daughters, although one of the sums provided was destined to heirs and assignees, while the other sums were not so destined; and the argument of the defenders, that the contingency of a failure of immediate descendants had been within the contemplation of the testator, was

[1] Special Case *Blair's Exrs.*, 1876, 3 R. 362.

[2] *Mags. of Montrose* v. *Robertson*, 1738, M. 6398; *Rattray* v. *Blair*, 8 Dec. 1790, Hume, 526; *Booth* v. *Black*, 16 July 1832, 6 W. & S. 175, affirming 9 Sh. 406.

[3] *Dixon* v. *Dixon*, 14 Sh. 938; 9 Feb. 1841, 2 Rob. 1; see Lord Brougham's opinion, p. 22.

[4] *Wilkie* v. *Jackson*, 9 July 1836, 14 Sh. 1121.

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rejected. The two cases cited are authorities for the proposition that, in the case of gifts to the testator's children, the legacy or residuary bequest to a child is understood to be affected by the implied condition *si sine liberis decesserit*, even where the testator has provided in different ways for the different members of his family, or has omitted some of them altogether.

Condition held to apply to a bequest to the testator's grandchildren collectively.

1292. The institution of grandchildren as testamentary heirs may have place either in the event of the failure of immediate descendants, or in consequence of the testator having chosen to restrict his children's interest to a liferent, with remainder to their issue in fee. In either of those cases, the interests of predeceasing grandchildren will transmit to their issue as conditional institutes by the operation of the *conditio*—notwithstanding the introduction of a destination-over or clause of survivorship; and whether the interest given consists of a share of the succession,[1] of a joint universal legacy,[2] or of a general legacy to all the children of one of the testator's sons.[3]

Whether the condition applies to a bequest to an individual grandchild.

1293. It has not been expressly decided that the condition in question will affect a legacy in favour of an individual grandchild, to the exclusion of his brothers and sisters; but if, as Lord Glenlee observed in the case of *Hamilton* v. *Hamilton*,[4] the application of the equitable condition to the case of grandchildren "is founded upon the obligation to provide for children and *descendants*," we are warranted in expressing the opinion that the issue of a favoured grandchild is as much entitled to the benefit of the condition as the issue of a child individually favoured.

Extension of the condition to legacies to collateral relatives as a class, where testator stands *in loco parentis*.

1294. With respect to descendants in the collateral line, if a legacy is left to all the children of a brother or a sister (the testator being *in loco parentis*), the issue of any member of the class predeceasing the testator will have right to a share of the succession as implied conditional institutes, and it is immaterial to the existence of the right that the testator had other brothers and sisters to whose families he left nothing,[5] or that the testator's scheme of distribution is such as to include relatives of different degrees.[6] The benefit of the implied condition was extended to the issue of all the children of one nephew in *Wallace* v. *Wallace*;[7] and in the case of *Mackenzie* v. *Holte's legatees*,[8] to the children of several legatees, who appear to have been relatives of the testator.

[1] *Thomson* v. *Scougall*, 9 July 1834, 12 Sh. 910; 31 Aug. 1835, 2 S. & M'L. 305.

[2] *Walker* v. *Park*, 20 Jan. 1859, 21 D. 286.

[3] *Robertson* v. *Houston*, 28 May 1858, 20 D. 989.

[4] *Hamilton* v. *Hamilton*, 8 Feb. 1838, 16 Sh. 478; see 487.

[5] *Bogie's Trs.* v. *Christie*, 1882, 9 R. 453.

[6] Sp. Ca. *Taylor*, 1884, 11 R. 423; *Roughead* v. *Rannie*, 1794, M. 6403.

[7] *Wallace* v. *Wallace*, 28 Jan. 1807, M. "Clause," App. No. 6; *Walker* v. *Walker*, 1744, M. 10,328, 14,858.

[8] *Mackenzie* v. *Holte's Legatees*, 1781, M. 6602.

Case of nephews and nieces of the testator.

1295. In the case of *Thomson's Trustees* v. *Robb*,[1] where the favoured legatees were all the nephews and nieces of the granter of a trust-settlement, it was suggested that the doctrine of implied institution was inapplicable, by reason of the destination having been conceived in favour of two of the legatees *nominatim*, while the others were described under the general designation of "the lawful children of the said Mrs. P. T. or Y., whether of a first or of a second marriage, *alive at the time of my decease*." But the Court disregarded this specialty, and by a unanimous judgment gave the children of two predeceasing nieces the benefit of the condition; Lord Cuninghame observing, that the condition *si hæres decesserit sine liberis* had been liberally admitted in our practice, and that the case before them was stronger than the previous cases of *Mackenzie*, *Wallace*, and *Christie*.

Condition held not to apply to bequests to individual members of a family collaterally related to the testator.

1296. The principle of liberal extension of the *conditio* was further developed in *Gauld's* case,[2] and its application was found to be not excluded by a provision of survivorship or gift to those children of brothers and sisters "who may be alive" at a certain time. In other cases the *conditio* has been held inapplicable, on the plea of "predilection," as in the case of a legacy to one of a family of sisters,[3] or to nephews and nieces called individually, to the exclusion of others in the same degree of relationship.[4] In such cases the presumption is that the bequest is given to the legatees as *personæ prædilectæ*,—a presumption which, of course, applies *a fortiori* to destinations to strangers in blood or to the testator's heirs in general.[5] It may here be added that kinship in the large sense, and not legal succession, is the ground of the *conditio*. Hence a bequest to children of a brother-uterine was held to be subject to the operation of this equitable extension of the testator's will.[6]

SECTION III.

Exclusion of the Application of the Conditio.

1297. The implied condition may be excluded where (1) the parent is not instituted; (2) the parent is only conditionally in-

[1] *Thomson's Trs.* v. *Robb*, 10 July 1851, 13 D. 1326. In *Allan* v. *Thomson's Trs.* 1893, 20 R. 733, it was observed that the nephews and nieces were called *nominatim*, and that this was a circumstance indicating *delectus personæ* only in case any of them had been left out, which was not done in that case. See Lord Benholme's observation on *M'Gown's Trs.* v. *Robertson*, 1869, 8 Macph. at p. 360.

[2] Sp. Ca. *Gauld's Trs.*, 1877, 4 R. 691.

[3] *Fleming* v. *Martin*, 1798, M. 8111.

[4] *Hamilton* v. *Hamilton*, 8 Feb. 1838, 16 Sh. 478; *Gillespie* v. *Mercer*, 1876, 3 R. 561; and per Lord Moncreiff in *Blair's* case, 3 R. 362.

[5] *Black* v. *Valentine*, 17 Feb. 1844, 6 D. 689; *Cockburn's Trs.* v. *Dundas*, 10 June 1864, 2 Macph. 1185.

[6] Sp. Ca. *Nicol*, 1876, 3 R. 374.

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stituted; (3) the institute is not within the category of persons to whom a testator is *in loco parentis;* (4) where the failure of the institute is provided for; and (5) in the case of special provisions.

Case where the parent has died before execution of the will.

1298. (1.) The ordinary case of the *conditio* is where an institute named or designed in the will predeceases the testator, and his children take the share intended for him on the assumption that the contingency of the death of the institute had been overlooked. But where the gift is to a family, say the testator's children or nephews and nieces, and one of the class had died before the execution of the will, it is plain that there is no institution of the deceased son or nephew, and that his issue cannot take benefit under a rule whose condition is *si institutus sine liberis decesserit."*[1] But even in such cases a distinction may be taken; because, if the testator did not know that one of the members of the class had failed, it may be that the issue of this member ought to be put in the place of the parent by an equitable extension of the rule. On this point it was observed by a high authority that he did not think it "consistent with the principles of human nature in men of good feelings, that it should make any difference in the view taken, that a particular nephew or niece of the class favoured, and against whom no expression of disfavour is anywhere found, unhappily had died many years before the date of the will."[2]

Case where the parent predeceases the testator.

1299. It is not the law that the issue of a deceased original legatee are excluded from the benefit of the *conditio,* because the testator was aware of the death of the institute, and survived him long enough to have made a codicil substituting issue in their parent's place.[3] It would seem that in such cases we can only consider the state of the testator's knowledge at the time when he made his will; we can never know what motives may have induced him to refrain from altering or adding to it.

Case where death of parent without issue is partially provided for.

1300. (2.) Next in order is the case of succession to a share to which the parent is only conditionally instituted. The case usually considered is that of a legacy to a class of persons to whom the testator is *in loco parentis,* and the survivors or survivor of them, with a declaration that in case any of the legatees shall die leaving issue, such issue shall succeed to the parent's share. But there are numerous cases in which the double contingency of the death of legatees leaving issue, and not leaving issue, is not fully provided for. This subject is considered in the third section of the chapter on survivorship, to which reference is accordingly made.

[1] *Rhind's Trs.* v. *Leith,* 1866, 5 Macph. 104; *Morrison's Trs.* v. *Macdonald,* 1890, 18 R. 181; and see *Wishart,* 1763, M. 2310.

[2] Per Lord Moncreiff (1st) 6 D. 123; and note the allusion to this possible exception in *Morrison's Trs., supra,* Lord Trayner's judgment.

[3] *Neilson* v. *Baillie,* 1822, 1 S. 458, N.E. 427; *Booth* v. *Black,* 1832, 6 W. & S. 175, affirming 9 S. 406.

Case where a legacy is conditional on the "survivance" of the original legatee.

1301. But again, a testator may institute a class of legatees in such terms that the *survivance of an event* is made a condition of the right to participate in the fund. In such cases the implied condition is excluded by the expressed condition of survivorship. This is exemplified in the case of *M'Call* v. *Dennistoun*,[1] where the gift was in this form, "to each of the children of my late sister Helen Wallis who shall be alive" at the period of his wife's decease, or of the testator's decease, the sum of £1000. One of the children of Mrs. Wallis predeceased the testator's wife, leaving a son, who claimed the legacy of £1000 as a conditional institute in virtue of the *conditio*. In this claim he was unsuccessful. The essential ground of decision (although other grounds of decision are indicated) is given in the following sentences of the opinions of the Lord President and Lords Ardmillan and Kinloch:[2] "The case is not so much that of a legacy which has lapsed as that of a failure of the condition on which the bequest was given. In that state of matters it is impossible to hold that the *conditio si sine liberis* can have any application." "The bequest is separate and particular to each child, and the bequest to each child is not a share of a fund, but is a definite sum, and the condition of survivorship is personal, attaching personally to each child, so that no child of Helen Wallis can have right to the sum bequeathed unless alive at the date of Mrs. M'Call's death." "He (the testator) expressly declares that these bequests shall only be payable to the parties favoured in the event of their being alive at the widow's death; this is as nearly as possible an express declaration that, if the parties died before the widow, these bequests should lapse."[3]

Where the institutes do not constitute a class.

1302. The principle that the condition of survivance excludes the implied institution of issue applies *a fortiori* where the legatees, although named together, do not constitute a family or class.[4]

Where the parent is himself a conditional institute.

1303. No case has been found in which the benefit of the *conditio* has been extended to the issue of a deceased legatee who was himself a conditional institute; and, where a testator has provided for the contingency of the death of an original legatee by means of a clause of conditional institution, it is a reasonable inference that he intended such conditional institution to be exhaustive, so that on the death of both the legatees the legacy should lapse. The rule that in general a child claiming under the *conditio* takes only

[1] *M'Call* v. *Dennistoun*, 1871, 10 Macph. 281.

[2] 10 Macph. pp. 284, 286, 288. But see *contra*, *Gauld's Trs.* v. *Duncan*, 1877, 4 R. 691, which the Judges distinguished from *M'Call's* case, but it is thought not very successfully.

[3] See also *Crichton's Tr.* v. *Howat's Tutor*, 1890, 18 R. 260 (3d point in Lord Trayner's opinion).

[4] *Chancellor* v. *Mossman*, 1872, 10 M. 995.

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the parents' original share is a case in point, but the principle under consideration is evidently capable of wider extension. Thus, in *Gillespie* v. *Mercer*,[1] where the residue of a trust-estate was destined to a series of legatees successively in terms which imported conditional institution as distinguished from substitution, and at the period of distribution all the members of the destination had failed, it was held that the children of the legatees last named in the destination were not entitled to the residue in virtue of the *conditio si sine liberis decesserit*. This is a strong illustration, because the legatees last named in the destination were grandnephews and grandnieces of the testator, and were at the date of the will the only members of a family; moreover, the competition was with next of kin. Lord Gifford's judgment indicates this ground of decision, viz., that the testatrix, when providing for the contingency of the death of the original legatees, might have conditionally instituted the children of the legatees last called to the succession, but had chosen not to do so.[2]

1304. The subject was again considered in a recent case, where the Judges, following Lord Adam, expressed views adverse to the extension of the *conditio* to the children of conditional institutes, but found it unnecessary to rely on that specialty as the ground of decision.[3]

Case where testator is not *in loco parentis*. Ascendants and collaterals.

1305. (3.) The next exception is where the institute is not within the class of persons to whom a testator can be *in loco parentis*. It has not been suggested that any one can be *in loco parentis* to his own parents or grandparents, and there are three cases establishing that a testator cannot be *in loco parentis* to his brothers and sisters,[4] the last of these being a nearly unanimous decision of the whole Court.[5] It must be admitted that the expression *in loco parentis* is hard to define;[6] but this doctrine or branch of the law is altogether artificial, and it was considered inexpedient to break down one of the barriers against its indefinite extension. The views of the writer will be found in the opinion subscribed by the consulted Judges in the case of *Hall*. Further, a testator is held not to be *in loco parentis* to his first cousins;[7] and the exception, it is presumed, would include descendants of first cousins, as well as more distant collaterals. It may

[1] *Gillespie* v. *Mercer*, 1876, 3 R. 561.

[2] 3 R. 565. See also Lord Moncreiff's observation in *Blair's Exrs.*, 3 R. at pp. 364-5.

[3] *Carter's Trs.* v. *Carter*, 1892, 19 R. 408.

[4] *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362; Sp. Ca. *Berwick's Exr.*, 1885, 12 R. 565; *Harvey Hall*, *infra*. See also *Fleming* v. *Martin*, 1798, M. 8111.

[5] Sp. Ca. *Harvey Hall*, 1891, 18 R. 690 (Whole Court).

[6] *Supra*, Section I.

[7] *Rhind's Trs.* v. *Leith*, 1866, 5 Macph. 104, overruling *Christie* v. *Paterson*, 1822, 1 Sh. 543, N.E. 498.

therefore be affirmed that no one is able to claim the benefit of the *conditio* who is not a descendant of the testator or of the testator's brother or sister.[1]

Case where a testator makes provision for issue of his legatees in some cases but not in all.

1306. (4 and 5.) Two exceptions may be considered together, viz., the express condition excludes the implied, and the conditional institution of children to parents under certain legacies is evidence that the testator meant other legacies containing no such conditional institution to be personal to the legatees. This is the case of *Greig* v. *Malcolm*, where the exception is thus put by Lord Corehouse:[2]—"The doctrine, which we have borrowed from the Roman law, proceeds entirely on the presumption that the testator, having overlooked or forgotten the contingency of the institute having children, has left children unprovided if they come into existence. But this presumption may be defeated by opposite presumptions or evidence, and there can be no stronger evidence to that effect than a clause in the settlement by which the testator does make a provision for the issue of predeceasing legatees, because it incontestably shows that he had them in view when he made the substitution." So in a recent case in the First Division of the Court,[3] where the testator, by making certain legacies conditionally payable to the issue of the legatees, showed that he had contemplated the contingency of legatees dying and leaving issue, it was held that the *conditio* was not to be implied in the case of a legacy given to the legatee without a conditional institution of issue, the Lord President observing that amongst the numerous cases illustrating the application of the *conditio* there are none which gainsay the justice and efficacy of the limitation laid down by Lord Corehouse.

Case where the issue of the legatee are separately provided for.

1307. The principle that the express condition excludes the implied is further illustrated by cases in which separate provision is made for the issue of a legatee either in the destination of the residue or by a separate legacy.[4] There is indeed one apparently exceptional case, where issue being separately provided for were also preferred to a legacy given to the father alone.[5] But this case is very satisfactorily explained by the present Lord Justice-Clerk in his opinion in the recent case of *Allan*,[6] where the *conditio* was held to apply to shares of residue given to nephews and nieces

[1] Hence the *conditio* does not apply to a legacy in favour of a natural child (*Martin's Trs.* v. *Milliken*, 1864, 3 Macph. 826), nor to a person called as heir or next of kin (*Cockburn's Trs.* v. *Dundas*, 1864, 2 Macph. 1185).

[2] *Greig* v. *Malcolm*, 1835, 13 Sh. 607, at p. 611.

[3] *Carter's Trs.* v. *Carter*, 1892, 19 R. 408.

[4] *Sturrock* v. *Binny*, 1843, 6 D. 117, see p. 122; *Dixon* v. *Dixon*, 1841, 2 Rob. 1, affirming 14 Sh. 938.

[5] Sp. Ca. *Bryce's Exrs.*, 1878, 5 R. 722.

[6] *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733.

collectively, but not to legacies differing in amount in favour of individual nephews and nieces. There can be little doubt that the concurring views of both Divisions of the Court on this point will lead to a more careful scrutiny of the terms of wills to which the *conditio* may have only a partial application.

SECTION IV.

Application of the Conditio to Grandchildren and to Heirs-at-Law.

Extension of the *conditio* to grandchildren.

1308. In the preceding edition the opinion of the writer was expressed to the effect that the *conditio si sine liberis decesserit* operated in favour of descendants generally, and was not confined to children of the institute. This opinion has been confirmed by a judgment of the Second Division of the Court,[1] and receives support also from the opinions delivered in a First Division case, although the question was not directly raised.[2] No good reason can be given for confining the benefit of this equitable principle to issue of the first degree.

Extension of the principle to heirs in heritage.

1309. On the question of the application of the *conditio* to heritable succession, it is easily seen that the case is not very likely to arise, because, according to the usual form of an heritable destination, the property is conveyed to an institute *nominatim*, and the heirs of his body or heirs-general. If in such a destination heirs should be omitted *per incuriam*, there being nothing in the context to suggest that their exclusion was intentional, it would seem that in principle the *conditio* is applicable, and that the eldest son will succeed as implied conditional institute. The cases noted below may be consulted.[3]

SECTION V.

Whether the Conditio is confined in its operation to Testamentary Provisions.

Case of real burdens and destinations in title-deeds.

1310. The important case is that of a contract of marriage containing provisions in favour of the children of the marriage; but it is desirable to consider the larger question. A legacy of heritage may be constituted by putting the heir under an obligation to pay a certain sum to younger children out of the estate. A provision

[1] *Irvine* v. *Irvine*, 1873, 11 Macph. 892,

[2] *Grant* v. *Brooke*, 1882, 10 R. 92; and see Sp. Ca. *Halliday*, 1869, 8 Macph. 112.

[3] *Grant's Trs.* v. *Grant*, 1862, 24 D. 1211; *Nairn's Trs.* v. *Melville*, 1877, 5 R. 128.

which is made a burden on the title of the heir may fairly be regarded as a family provision and therefore subject to the operation of the *conditio*, as was found in the case of *Halliday*.[1] So where, at the purchaser's instance, a destination is inserted in a title-deed or bond, this is considered to be the testamentary act of the grantee, and there is no reason why the *conditio* should not apply, the destination of course being revocable. In a recent case, where heritable estate was conveyed by two sisters to themselves and another sister in liferent, and to their nieces *nominatim* (the only nieces they had), and the survivors or survivor of them, in fee, the *conditio* was held to be inapplicable.[2] The circumstances that this was a settlement of a special subject, that the nieces were not called as a class, and that the gift contained a clause of survivorship, were referred to in the judgment; but their Lordships also expressed grave doubts as to the possibility of applying the *conditio* to a destination in a deed of conveyance *inter vivos*.

Marriage-contract provisions. Discussion of the cases.

1311. With respect to marriage provisions, the case stands thus:—If the *conditio si sine liberis decesserit* is derived from the Roman law then it is a rule of construction of testamentary provisions; and if it were now proposed for the first time to apply it to marriage provisions so as to confer on grandchildren as matter of contract rights which the parents only bound themselves to give to their children, it is conceived that such a proposition would be an illegitimate extension of the doctrine of the Roman jurisprudence, involving a restriction of the right of contract, which no Court of law has the power to make. The question then is, whether the suggested extension of the rule to contractual provisions has been recognised by decisions of such an authoritative character as to make it impossible for the existing Courts of the country to interpret marriage provisions according to their plain, true, and unadulterated meaning. When this point was raised in argument before the Court of Session in *Edwardes* v. *Hughes*,[3] the Judges constituting the majority of the Court reserved their opinion on the question of the applicability of the *conditio* to marriage provisions, a question which, in their view of the deed under consideration, did not arise for decision. When the case came by appeal before the House of Lords,[4] this question did not necessarily arise for decision in consequence of the view taken by their Lordships on the first point of the case. But it was raised

[1] Sp. Ca. *Halliday*, 1869, 8 Macph. 112. See also *Chancellor* v. *Mossman*, 1872, 10 Macph. 995, a disposition of heritage, where the *conditio* was held inapplicable.

[2] *Crichton's Tr.* v. *Howat's Tutor*, 1890, 18 R. 260.

[3] *Edwardes* v. *Hughes*, 1890, 18 R. 319.

[4] *Hughes* v. *Edwardes*, 1892, 19 R. (H.L.) 33.

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by the argument of the appellant *ex parte;* and Lord Watson, with whom the other Law Lords concurred, expressed a distinct opinion in favour of the application of the *conditio* to marriage provisions, pointing out that there were three previous decisions in which the *conditio* was held to be applicable to obligatory provisions. In the subsequent case of *Macdonald* v. *Hall,* this expression of opinion was founded on as a decision of the question, and was used as an argument in support of the views there laid down regarding the rights of grandchildren under contrac's of marriage.[1] Now it is doubtless correct to say that the three cases referred to might be indexed as authorities bearing on the *conditio si sine liberis decesserit;* but it may be affirmed with equal accuracy that in none of them is there any evidence that the argument against the extension of the *conditio* to contractual provisions was considered. In *Wood* v. *Aitchison,*[2] it would appear from the statement of the pleadings that the case was argued mainly as a question of vesting, and the opinion of the Court is there given in the terms quoted by Lord Watson, viz.—"That in all provisions of this sort the issue of children predeceasing the term of payment were entitled to the share which their parent could have claimed," no reference being made to the circumstance that the provision under construction was an obligatory and not a testamentary provision. In *Robertson* v. *Houston*[3] the action embraced a variety of questions on the construction of two instruments, a marriage-contract and a will. The Lord Ordinary (Lord Mackenzie) certainly found that the grandson of the spouses was entitled in virtue of the *conditio* to payment of a marriage provision destined to his father, the only child of the marriage. There were two reclaiming notes, one being at the instance of the grandson, the other at the instance of his mother, which had reference to other points in the case, neither of the reclaimers being interested in disputing the Lord Ordinary's finding on the subject here in question. Accordingly, while separate opinions were delivered by the four Judges composing the Court, no reference is made in the opinions to the finding of the Lord Ordinary regarding the implied institution of the grandson, which in fact was not reclaimed against.

1312. The third case is *Arthur and Seymour* v. *Lamb,*[4] a case in which questions remitted by the Court of Chancery for the opinion of the Court of Session were answered, but in which apparently no oral judgment was delivered. In one of the answers it is

[1] *Macdonald* v. *Scott or Hall,* 2 July 1893, L.R. App. Ca., p. 663, and see p. 653.

[2] *Wood* v. *Aitchison,* 1789, M. 13,043.

[3] *Robertson* v. *Houston,* 1858, 20 D. 989.

[4] *Arthur and Seymour* v. *Lamb,* 1870, 8 Macph. 928.

stated that a certain marriage provision did not lapse by the death of the only child of the marriage, but subsisted in favour of the issue left by the child. On the whole, it may be affirmed that the most important authority for the application of the *conditio* to obligations is Lord Watson's judgment, which, however, was given in a case in which the appellant only was represented at the bar, and was given apparently in deference to the supposed authority of the older cases.

CHAPTER XL.

LEGACIES, WHETHER CUMULATIVE OR IN SUBSTITUTION.

Uncertainty of the law as to double legacies.

1313. The earliest of the modern cases on double legacies is the case of *Horsbrugh*,[1] in which a variety of questions of this nature were submitted to the consideration of the whole Court, and were systematically determined. The case is deserving of an attentive consideration on several grounds. In the first place, it raised for decision some very important questions in the law of legacies, in a way that necessitated a resort to fixed principles of interpretation. On another ground it may be regarded as a leading authority, since it was a decision based upon the opinions of all the Judges, all of whom, including in their number several jurists of acknowledged eminence, gave separate opinions. This very circumstance, however, while it enables us to illustrate many of the recognised distinctions in this branch of law by apposite quotations, makes it extremely difficult to represent with accuracy the collective opinion of the Court upon any one of the questions submitted to its decision. Independently of the merits of the judgment, the case is valuable on account of the clear recognition, in the opinions of almost all the Judges, of the principle of uniformity of interpretation throughout the United Kingdom on the question whether a particular bequest is operative. As the elucidation of this branch of our subject will be very much aided by taking into view the decisions of the Judges of the English Equity Courts—who have striven, and with considerable success, considering the inherent difficulties of the problem, to bring the interpretation of double legacies under the rule of positive law—it is necessary, in order to justify the proposed treatment of the subject, to refer to the authorities which establish the principle of uniform interpretation.

Identity of the principles of interpretation recognised by the Courts of England and Scotland.

1314. In *Horsbrugh* v. *Horsbrugh* the Lord Justice-Clerk Hope observed that, in point of practical application, there did not seem to be any substantial difference between the laws of England and Scotland,—an opinion which he supported by an analysis of the leading English cases which had been decided up to that date.[2]

[1] *Horsbrugh* v. *Horsbrugh*, 12 Jan. 1847, 9 D. 329; 1 March 1848, 10 D. 824. The case is also reported in 9 D. 324, on a preliminary point, viz., whether a particular writing was to receive effect as forming a part of the testatrix's will.

[2] 9 D. 340-342.

Lord Cuninghame, recognising the authority of the English cases, rested his opinion[1] on the rule laid down by Lord Lyndhurst in the case of *Fraser* v. *Byng*,[2] viz., that when a codicil appeared to be "a review of the whole dispositions of the will," no duplication of the legacies should be inferred. Lord Moncreiff, in the same case, and still more clearly in the subsequent case of *Grant* v. *Stoddart*,[3] expressed his concurrence in the principles of interpretation that had been laid down by the English lawyers, referring in the latter case to Mr. Justice Williams' exposition of the law as to duplication of wills and implied revocation. Lord President Boyle observing that in the Civil, Scottish, and English laws certain principles had been fixed with reference to the interpretation of double legacies, proceeded to show that the presumption of the English law in favour of duplication had received the sanction of our own Courts in the case of *Elliot* and other cases.[4] In the previous case of *Straton's Trustees* v. *Cuningham*,[5] the Lord President had observed that he was disposed to give much weight to the English decisions on this class of questions,—an opinion in which Lord Medwyn concurred, observing that the rule laid down in *Fraser* v. *Byng* was a very reasonable rule of construction, and that the question was as to its application. In *Stoddart* v. *Grant*, Lord Truro referred alternately to English and Scottish decisions, both on the question of implied revocation and on accumulation of legacies; adding that it was scarcely necessary to refer to authorities in support of principles which were well settled and understood throughout the kingdom.[6]

Rules adopted by Lord Bathurst from the Scottish case of *Stirling*.

1315. It deserves to be noticed that in the leading English case of *Hooley* v. *Hatton*,[7] to which reference will immediately be made, Lord Bathurst referred to the case of *Stirling* in the Court of Session, as being in accordance with the principles of the Civil Law, upon which his judgment was rested.

Legacies given to the same person by different instruments presumed to be cumulative.

1316. The principle established by the cases of *Stirling* and *Hooley* v. *Hatton* is, that where legacies of quantity are given to the same person, but under different instruments, in the absence of any indication of a contrary intention, both legacies are due, and this even where the bequests are similar in form and identical in amount. In the former case,[8] the testator, Thomas Deans, by his

[1] 9 D. 352.

[2] *Fraser* v. *Byng*, 1 Russ. & My. 90.

[3] *Grant* v. *Stoddart*, 27 Feb. 1849, 11 D. 860; see p. 872. See also Lord Ivory's opinion in *Horsburgh's* case, 9 D. 375.

[4] 9 D. 379. Lords Mackenzie and Fullerton also identified the English, Roman, and Scottish systems in their observations.

[5] *Straton's Trs.* v. *Cunningham*, 10 March 1840, 2 D. 820.

[6] *Stoddart* v. *Grant*, 28 June 1851, 1 Macq. 163; see 170, 171, and 175.

[7] *Hooley* v. *Hatton*, *infra*.

[8] *Stirling* v. *Deans*, 1704, M. 11,442; 2 Fount. 231.

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testament legated and bequeathed to his sister the sum of 6000 merks, and burdened his heir and executor with the payment of this sum. He afterwards assigned to the same person the sum of 6000 merks, owing to him by a debtor; and the argument was taken, as the Lord Justice-Clerk remarked in the *Horsbrugh* case,[1] on the footing that both gifts were legacies. The Lords found that, "though it was the same testator, the same legatar, and the same sum, yet the last having no relation to the first, they were both due, and the last did not come in place of the first, nor absorb it, this being *quæstio conjectura voluntatis defuncti.*"

1317. In *Hooley* v. *Hatton*,[2] the testatrix by her will gave to Lydia Hooley, her woman, a legacy of £500. By a subsequent codicil she gave to the same person a legacy of £1000; and the question was, whether the last legacy alone passed, or whether the legatee should have both the £1000 and the £500. The case was argued at great length, and was decided by Lord Chancellor Apsley, afterwards Earl of Bathurst, assisted by Lord Chief Baron Smyth and Mr. Justice Aston. The latter learned Judge, who delivered the leading opinion, reviewed the Civil Law and French authorities, and in conformity with them laid down the following propositions:—

English rules of construction.

Specific legacies.

Legacy in the same

and in different instruments.

Legacies of greater or less amount.

First, when the same specific thing is given twice, the legacy can take effect but once;[3] and secondly, where the like quantity is given twice, if the repetition was in the same writing and of the same amount, it might be attributed to forgetfulness; but where equal sums were given in two distinct writings, both ought to pass.[4] Third and fourthly, as to a less sum or a larger in the latter deed, the presumption is for two legacies, and the heir must show that the one was meant to be blended with the other. The result was, that a legacy was not double where it was given for the same cause, in the same act, and *totidem verbis*, or only with small differences; but where in different writings there was a bequest of equal, greater, or less sums, it was an augmentation.

Legacies not cumulative unless both instruments intended to be operative.

1318. I. LEGACIES GIVEN BY DIFFERENT INSTRUMENTS.—In order that legacies given by different instruments may both receive effect, it must appear that both instruments were intended to be operative. The tendency of the later decisions is to sustain all testamentary writings that have not been expressly or impliedly revoked; and revocation is only implied where both instruments profess to dispose of the entire estate, in which case the latter deed is held to revoke the former, as being inconsistent with it.[5] Accord-

[1] 9 D. 343.

[2] *Hooley* v. *Hatton*, 1 Br. Ch. Ca. 390; 2 Wh. & T. L. C. 6th ed. p. 360.

[3] Dig. lib. 22, tit. 3, fr. 12.

[4] Dig. *ut supra*; Ricard, Traité des Donations, vol. i. p. 419, and other authorities cited in *Hooley* v. *Hatton*. See the report in White & Tudor's Leading Cases, *ut supra*.

[5] *Stoddart* v. *Grant*, 1 Macq. 163, re-

ingly, where there exists a doubt as to both deeds being operative, the practice is to dispose of that question in the first place.[1] The fact that legacies are given to the same persons in both instruments affords no evidence of any intention to take away the testamentary character of the first instrument; for implied revocation is only to be inferred as a consequence of inconsistency in the two dispositions, which cannot be argued from the repetition of legacies to the objects of the testator's favour.[2] If two instruments are both of them total dispositions of the testator's succession, it would seem that the first can have no operation, even in favour of legatees not named in the second.[3] In a case where legacies were claimed under two successive general dispositions, Lord Justice-Clerk Inglis observed :—"In this case both deeds are intended to apply to the whole property of the testator; each of them contains a universal conveyance. As by each of them the entire estate is conveyed and divided, it is obvious they cannot both receive effect, or both be taken as parts of one settlement. It is perfectly clear that the latest deed must be taken as the testator's settlement."[4]

Presumed revocation where both settlements are total.

1319. The principle that duplication must be presumed in the absence of internal evidence of a contrary intention has received the sanction of the Courts of both countries in numerous cases. In *Elliot* v. *Lord Stair's Trustees*,[5] the testator, by a codicil to his trust-settlement, directed his trustees to pay Mr. Elliot £3000, without any qualification; and by a codicil, made two years later, he bequeathed to the same person the sum of £3000, "free of the legacy tax and of all other deductions." Lord Meadowbank was of opinion that the two codicils contained no evidence of intention other than that which resulted from the terms of the bequests, and upon general principles decided in favour of the legatee. The Court at first altered, but, on reconsideration, unanimously adhered to the Lord Ordinary's interlocutor. From this and other cases, it is apparent that substitution is not to be inferred because the subsequent legacy is of the same amount;[6] and it has long been

Examples of the presumption for accumulative construction.

Legacies of the same amount in different writings not presumed to be in substitution.

versing 11 D. 860; *Baird* v. *Jaap*, 15 July 1856, 18 D. 1246; *Beattie* v. *Thomson*, 21 June 1861, 23 D. 1163.

[1] *Horsbrugh* v. *Horsbrugh* (1st report), 4 May 1845, 9 D. 324; and cases of *Baird* and *Stoddart*, *supra*.

[2] Per Lord Truro in *Stoddart* v. *Grant*, 1 Macq. 174.

[3] *Beattie* v. *Thomson*, *infra*; *Stewart* v. *Baillie*, 27 Jan. 1841, 3 D. 463; *Sellar* v. *Stephen*, 21 June 1855, 17 D. 975. This is now, since 1 Jan. 1838, the law of England (2 Wh. & T. L. Ca. *ut supra*); though prior to that time legacies in the former will were operative so far as no substitution was provided in the latter; *Kidd* v. *North*, 14 Sim. 463; *Jackson* v. *Jackson*, 2 Cox, 35.

[4] *Beattie* v. *Thomson*, 21 June 1861, 23 D. 1163, 1166. On the subject of implied revocation, see Chapter XXI., Section V.

[5] *Elliot* v. *Stair's Trs.*, 27 Feb. 1823, 2 Sh. 250, N.E. 218.

[6] *Stirling* v. *Deans*, *supra*; *Lindsay* v. *Anstruther's Trs.*, 6 Feb. 1827, 5 Sh. 297, N.E. 276; *Gillespie* v. *Donaldson's Trs.*, 22 Dec. 1831, 10 Sh. 174; *Royal*

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settled that a subsequent legacy, if of larger amount than the original legacy, is not for that reason presumed to be substitutional, but rather additional; for, said Lord President Hope, whatever the testator's intention might be, he had given the party a right to demand payment of both the legacies.[1] *A fortiori*, if the second legacy is given to the legatee under a different character or designation,[2] or is charged upon different heirs or different subjects;[3] or if the reversion is given over to a different person,[4] or under different conditions—as where one of the legacies is alimentary, or to a married woman for her separate use;[5] or in the case of joint legacies, where different parties are joined with the claimant,[6]—the legacies will be held to be cumulative. The same construction will necessarily be put upon double legacies which are not *ejusdem generis;* so that even where, in consequence of an apparent intention on the part of the testator to remodel his dispositions, successive pecuniary legacies are found to be substitutional, yet, if annuities be also given to the same legatees, these are held to be given in addition to the pecuniary legacies.[7] A testator may of course give a legacy of fixed amount and a share of the residue to the same individual; and where a residuary legatee claims a pecuniary gift as being one of a class of persons to whom a sum of money is left, there is no presumption against his claim; on the contrary, he is clearly entitled to take in both characters.[8]

Rule applies *a fortiori* where legacies are different in quality or in amount.

Application of the rule to donations and assignations *mortis causa*.

1320. In determining the effect to be given to successive testamentary dispositions, a donation or assignation *mortis causa* is regarded as a legacy.[9] Thus, where a testatrix bequeathed a legacy

Infirmary v. *Muir's Trs.*, 1881, 9 R. 352. See the English cases, which are very numerous, cited in 2 Wh. & T., 6th ed. p. 360 *et seq.*

[1] *M'Intyre* v. *M'Farlane*, 1 Mar. 1821, F.C.

[2] *Elliot* v. *Stair's Trs.*, *supra*; *Horsbrugh* v. *Horsbrugh* (2d point), 1 Mar. 1848, 10 D. 824; *Wilson's Trs.* v. *Stirling*, 13 Dec. 1861, 24 D. 164. But see *Nasmyth* v. *Connell*, 19 Dec. 1833, 12 Sh. 243.

[3] *Frew* v. *Frew*, 15 Feb. 1828, 6 Sh. 554.

[4] *Straton's Trs.* v. *Cuningham*, 10 Mar. 1840, 2 D. 820. So also Lord President Boyle observed: "Where, in the first legacy to a particular legatee, certain provisions are made for the interest of third parties, which are affected in bequeathing the same sum a second time to the same legatee, that affords a circumstance of real evidence to show that effect is to be given to both legacies." *Horsbrugh* v. *Horsbrugh*, 9 D. 379.

[5] *Thomson* v. *Lyell*, 18 Nov. 1836, 15 Sh. 32; *Lindsay* v. *Anstruther's Trs.*, 6 Feb. 1827, 5 Sh. 297, N.E. 276.

[6] *Horsbrugh* v. *Horsbrugh* (1st and 4th points), 12 Jan. 1847, 9 D. 329.

[7] *Baird* v. *Jaap*, 15 July 1856, 18 D. 1246. See the principle stated in Lord Colonsay's speech, p. 1280. *Smith* v. *Donaldson*, 10 June 1829, 7 Sh. 734; Sp. Ca. *Bryce's Trs.*, 1878, 5 R. 722.

[8] *Kirkpatrick* v. *Bedford* (*Sharpe's Tr.*), 1878, 6 R. (H.L.) 4.

[9] *Watson* v. *Blair*, 15 Nov. 1831, 10 Sh. 12; *Stirling* v. *Deans*, 1704, M. 11,442; *Stuart* v. *Fleming*, 1623, M. 11,439; *Lord Cardross* v. *E. of Mar*, 1639, M. 11,440. In those cases both provisions were of a testamentary nature. *Dewar* v. *Scott*, 1880, 8 R. 83, a case of a legacy and a bond for the same amount with a destination inserted in favour of

of £1000 five per cent. stock, or alternatively £1000 sterling, and after the 5 per cents. had been converted into new 4 per cents., transferred £1000 of the latter stock to the legatee, who ordered payment of the dividends to be made to the testatrix during her lifetime, the legatee was held entitled to both the donations; for, asked Lord Gillies, what purpose was the transfer to serve if it did not import something more than the legacy already provided? The pursuer derived no immediate benefit from it; and unless the object of the transaction were to confer an additional benefit on the pursuer over and above the legacy, it was altogether futile.[1]

Construction where testator declares certain legacies to be additional, and is silent as to others.

1321. If a testator by a codicil or latter will declare certain of the bequests thereby given to be *in addition* to those given by a former will,[2] it may generally be inferred, from the absence of similar expressions in other legacies, that the intention as to such legacies was to give in substitution; but the inference is not always conclusive. In *Russell* v. *Dickson*[3] Lord Chancellor Sugden remarked upon this circumstance:—"I assent to the argument that if a testator expressly declares one gift to be in addition to another (and for this purpose the Court is entitled to look at other parts of the same instrument, or at gifts in other testamentary instruments), and in another instance makes a gift without any such declaration, this is a circumstance to show that the latter was intended not to be additional, but in substitution. But still too much weight must not be attached to the variation. To hold that it is conclusive would be going too far. It is a circumstance, no doubt important to show that, where the testator meant addition, he knew how to express his meaning, and a party is entitled to rely on it to that extent." On the other hand, if a testator expressly provide that one legacy shall be in lieu or in satisfaction of another,[4] it may by parity of reasoning be inferred that legacies not stated to be in satisfaction are additional. And if some legacies are declared to be in addition to, and others in place of legacies formerly given, the presumption with regard to legacies given simply, which might have arisen from the use of either of those expressions alone, would seem to be neutralised.[5]

Construction where certain legacies are declared to be in substitution.

How far the argument drawn from expressions in other legacies is reliable.

1322. In the leading case of *Lee* v. *Pain*,[6] Sir J. Wigram, V.-C., observed that the argument drawn from the use of such expressions

the legatee. For the cases of ademption of marriage-contract provisions by legacies, see the next chapter, Section II.

[1] 10 Sh. 15.

[2] See *Gillespie* v. *Donaldson's Trs.*, 22 Dec. 1831, 10 Sh. 175; *Elliot* v. *Lord Stair's Trs.*, 27 Feb. 1823, 2 Sh. 251, N.E. 218; *Horsbrugh* v. *Horsbrugh*, 9 D. 345, per Lord Justice-Clerk Hope.

[3] *Russell* v. *Dickson*, 2 D. & War. 133.

[4] *Lindsay* v. *Anstruther's Trs.*, 6 Feb. 1827, 5 Sh. 297, N.E. 276; *Henderson* v. *Burt*, 16 Jan. 1858, 20 D. 402.

[5] *Elliot* v. *Stair's Trs.*, *supra*.

[6] *Lee* v. *Pain*, 4 Hare, 201, 221.

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was only legitimate when used in corroboration of the inference arising from other circumstances; and that the use of superfluous words in one part of a will was insufficient to control the proper effect of words in another part of the same instrument; for *expressio earum quæ tacite insunt nihil operatur.* As an argument in corroboration of the apparent scope and purpose of the posterior writing, there can be no doubt that the inference deducible from the use of such expressions is legitimate; and to this extent the Scottish authorities already cited support the principle laid down by Lord St. Leonards and Sir J. Wigram.

Effect of the use of ambiguous language in relation to duplication or accumulation.

1323. Sometimes there is a difficulty, in consequence of the ambiguity of the language used by the testator, in determining to what extent a legacy is intended to operate as an additional provision. Thus in *Smith* v. *Donaldson*,[1] a testator, after having by his trust-settlement appointed his trustees to pay one-half of the free proceeds of his moveable estate to his wife, added a codicil, by which he bequeathed, "in addition to the legacies contained in the deed of settlement already executed by me," the interest arising from all such free money as he might leave behind him at his death, for her liferent use; declaring that she should have no right to the principal *in virtue of this bequest.* Lord Mackenzie and the Court ruled that the widow was entitled to the capital of one-half of the estate in virtue of the settlement, and to the interest of the other half in virtue of the codicil: for, though no interest in the principal was given to her in virtue of the latter bequest, it was given to her by the settlement, and had never been effectually taken away. In *Henderson* v. *Burt*,[2] the ambiguity arose from the position of the words of gift in the second instrument. The testator, by his antenuptial contract, had secured to his widow an annuity of £100 Scots, and the liferent of a house and furniture, &c. By his testamentary settlement he gave her the liferent use of certain heritable subjects, adding the words, "and these in addition to what is provided to her by contract of marriage, *and* the sum of £8 sterling yearly during all the days of her lifetime." In such cases the principle of liberal construction is to be applied.

Legacies given upon different motives.

1324. If in one of the testamentary instruments a motive is assigned for the gift, and in another a legacy of the same sum is given for a different motive, or without any assigned motive, the presumption is for duplication; and conversely, where two legacies are given by different testamentary instruments, and there is an exact coincidence both in the sums given and in the motives assigned, the posterior bequest is presumed to be given in sub-

[1] *Smith* v. *Donaldson*, 10 June 1829, 7 Sh. 734.

[2] *Henderson* v. *Burt*, 16 Jan. 1858, 20 D. 402.

stitution. The cessation of the motive is not a sufficient reason for presuming a revocation of the legacy,—as where a testator gave legacies of £1000 each to her nephews, and by a second writing recalled the legacy to B., and gave the sum to A., and by a third legacy renewed the legacy to B., it was held that A. was entitled to two legacies of £1000.[1]

Inference of intention to give in substitution from similarity of motive and from punctual repetition.

1325. It would appear that a mere similarity in the motives will not be sufficient to redargue the presumption for accumulation if the sums are different;[2] nor will a coincidence in the sums, in the absence of any expressed motive, suffice to raise a presumption for duplication. It is true Lord Thurlow once observed, in words which have been often cited, that "simple repetition, when it is exact and punctual, has been regarded as sufficient proof that it is only intended for repetition;"[3] but this *dictum* has not been recognised as authoritative in England,[4] and it stands in direct opposition to the authority of the principle laid down in *Stirling's* case,[5] upon which the interpretation of double legacies in the United Kingdom is based. Lord Fullerton, in the case of *Horsbrugh*, observed that the Court could not adopt the reasoning ascribed to Lord Thurlow, as it was in direct opposition to the general principle. "To hold," he said, "that simple and punctual repetition of a legacy of the same amount is of itself sufficient to show that mere repetition and not duplication was intended, is just to lay down, in other words, that separate writings do not import separate legacies. It may be true that, when the repetition is exact and punctual, that forms a circumstance admitting more easily of being confirmed by additional intrinsic evidence. But still, some such additional intrinsic evidence is indispensable; and in the absence of it the separate writings must each receive full effect."[6] The assignment of a special motive in the posterior writing was considered to be a sufficient reason for holding one of the legacies to be additional, in a case where there was intrinsic evidence of an intention to revise,—leading, in the

Lord Thurlow's doctrine criticised.

[1] *Wright's Trs.* v. *Wright*, 1889, 16 R. 677.

[2] *Lord* v. *Sutcliffe*, 2 Sim. 273; *Hurst* v. *Beech*, 5 Madd. 352, where the legacies were given for faithful service. "The presumption," said Sir John Leach, "cannot be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different."

[3] *Moggridge* v. *Thackwell*, 1 Ves. jun. 473. This case was, however, followed, and Lord Thurlow's *dictum* cited as authoritative by Wood, V.-C., in *Tatham* v. *Drummond*, 33 L.J. Ch. 438.

[4] See Sir Wm. Grant's observations in *Benyon* v. *Benyon*, 17 Ves. 42; also *Roch* v. *Callen*, 6 Hare, 531, where a testatrix, by two different deeds, bequeathed annuities of the same amount to her servant E. H., and Wigram, V.-C., held that they were given cumulatively, as the word servant did not express the motive, but was only descriptive; and *Lobley* v. *Stocks*, 19 Beav. 392.

[5] *Stirling* v. *Deans*, 1704, M. 11,442.

[6] *Horsbrugh* v. *Horsbrugh*, 9 D. 383.

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case of other bequests given by the same deed, to the inference that they were intended to be substitutional.[1]

Presumption against duplication,—

1326. The intention of the testator, when it can be collected from the instruments containing the legacies, will of course override the general presumption for duplication which arises in the absence of such intention.[2] An intention to substitute one legacy for another may legitimately be inferred in the following cases:—

where testator is revising his settlements;

First, where the second instrument expressly refers to the first in terms which indicate an intention to alter its provisions in the manner of revision, and not merely by addition;[3]

where both settlements are total;

secondly, where, from the structure and form of the settlements, the intention is apparent that both should not be operative, *e.g.*, where both are total settlements,[4] or where the second instrument is a total settlement intended to supersede prior informal writings;[5]

where the two instruments are identical in scope and provisions;

thirdly, where the instruments are either exactly or very nearly identical in their provisions—and the more numerous the instruments are, the inference will be stronger—the absence of any material variance between the prior and the posterior dispositions of the estate will be converted into an argument that the intention was in substance to repeat or republish the prior disposition;

where second deed caused by altered circumstances.

fourthly, substitution may be inferred where the form of the disposition is altered to meet the altered circumstances of the legatee, or to constitute a liferent or benefit of some kind in favour of another legatee;[6] and

[1] *Horsbrugh* v. *Horsbrugh* (3d case), 1 March 1848, 10 D. 824, 826; and *Ridges* v. *Morrison*, 1 Br. Ch. Ca. 388, cited by Lord President Boyle; and see his Lordship's remark in 9 D. 379. The decision on the 11th point in *Horsbrugh's* case (9 D. 329) appears, at first sight, inconsistent with the finding on the point noticed in the text; but the explanation probably is, that the direction to see certain legacies to other parties paid, was not a motive but a condition annexed to the bequest.

[2] As an example of how an intention to give in substitution is deduced from testamentary writings, reference is made to *Livingston* v. *Livingston*, 7 Nov. 1864, 3 Macph. 20.

[3] *Baird* v. *Jaap*, 15 July 1856, 18 D. 1246; *Henderson* v. *Burt*, 16 Jan. 1858, 20 D. 402; *Horsbrugh* v. *Horsbrugh*, 12 Jan. 1847, 9 D. 329. The principle which was given effect to in most of the points raised in that case, and which Lord President Boyle thought had been carried too far, was thus stated by his Lordship:—"Unless it appears to be clear that the first legacies are revoked when the second legacies are given, I think that the legatees are entitled to both legacies. I do not say there must be a formal revocation. If there is undoubted evidence of a revocation of the first legacies *in the settlement viewed as a whole*, then such revocation must receive effect" (9 D. 380).

[4] *Beattie* v. *Thomson*, 21 June 1861 23 D. 1163; *Stewart* v. *Baillie*, 27 Jan. 1841, 3 D. 463. See *Grant* v. *Stoddart*, 28 June 1852, 1 Macq. 163, and 11 D. 860; *Seller* v. *Stephen*, 21 June 1855, 17 D. 975.

[5] *Brander's Trs.* v. *Anderson*, 1883, 10 R. 1258.

[6] *Free Church of Scotland* v. *Mather*, 1887, 14 R. 333. The second bequest of £6000 to the Free Church was made subject to an additional liferent, and it was held that the second bequest was only a qualification of the first in favour of the liferenter.

lastly, where the second provision is demonstrative, *i.e.*, when it only points out a fund from which the original provision shall be paid or made good.[1]

Example of revision.

1327. (1.) An example of the first of these elements of intention occurs in the expressions used in the last testamentary writing of Lady Baird Preston,[2] where the testatrix having referred to the diminution of her resources as a reason for altering her list of legacies, it was justly held that the alteration contemplated must have been an alteration which would have the effect of detracting from, and not of adding to, the charges on her estate, and that the legacies given by that instrument were accordingly substitutionary, in so far as they were *ejusdem generis* with those given in previous writings, though different in amount.[3]

Rule that the last of two total settlements is preferable.

1328. (2.) As to the second element of intention, it has been sufficiently considered in commenting on the class of cases in which the principle has been laid down, that if both settlements embrace dispositions of the legal as well as the beneficial estate, one of them only is capable of being effectuated, and therefore the posterior settlement, as containing the expression of the testator's last will, is to be preferred.[4]

Inference from general similarity of the instruments.

1329. (3.) The similarity of the different testamentary instruments, and the repetition in them of a number of legacies of the same amount, were among the main reasons which induced the Court to reject the claims of the legatees for double and triple provisions in the cases of *Horsbrugh* and *Baird*, which have been so often referred to. It appears from Messrs. White and Tudor's analysis of the Chancery decisions that this is considered in England also to be a sufficient reason for rejecting the supposition of duplication.[5] To this head also may be referred the case of *Arres' Trustees*,[6] where a testator, by separate writings, bequeathed to his natural son £4000, and then £6000, with conditional institutions which were nearly identical, and the second provision only was found to be due. It is noticeable that in the second writing the testator declared his intention to dispose of his "whole worldly affairs," and if both writings had received effect his estate would have been nearly exhausted—a circumstance which is not noticed in the decision. It is difficult to reconcile this case and the case of

[1] *Chivas' Trs.* v. *Chivas*, 17 Oct. 1893, 31 S.L.R., p. 1.

[2] The words referred to are:—"The enormous expense into which I have been led by lawsuits having circumscribed very much my funds, I have this day altered my list of legacies. . . . Legacies to be reconsidered when I know the end of the Chancery suit, which I expect daily, when I hope to add to the list." See 18 D. 1251.

[3] See also *Tennent* v. *Dunsmure*, 1878, 6 R. 150.

[4] Chapter XXI., Section V.

[5] 2 Wh. & T., 6th ed. 360, and 1 Russ. & M. 102, note; and *Methuen* v. *Methuen*, 2 Phill. 416, there referred to.

[6] *Arres' Trs.* v. *Mather*, 1881, 9 R. 107.

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Muir's Trustees,[1] which was decided only a few weeks later by the other Division of the Court.

Alteration of the destination in consequence of altered circumstances of the legatee.

1330. (4.) Where the posterior bequest is settled in a different manner from the prior, and the alteration in its terms has a manifest reference to some change in the situation of the legatee, the presumption for duplication is taken away. This is the principle of the case of *Belshes* v. *Murray*,[2] which is so frequently referred to in the reports of the cases occurring in the early part of this century. The testator, Anthony Murray, by his first general settlement, bequeathed to his niece, Emilia Murray, a legacy of £300, payable at the first term *after her marriage*, with interest thereafter, and an annuity of £17 payable until marriage. He afterwards executed a second settlement bearing reference to the first, and adopting the legacies contained in it. The niece afterwards married, and had issue two sons; and Mr. Murray then executed a bond of provision in favour of the family, by which he bound his executors in payment of a legacy of £1200, payable to the lady for her liferent use, and to her children in fee; whom failing, to her husband, subject to a power of division. Both legacies were claimed, but the executor maintained, successfully, that as the first legacy was given to the niece with reference to her then condition as a single woman, and the testator had afterwards settled funds of larger amount upon herself and her family, it must be presumed that this was all he intended to give.[3] The Lords found the legacy of £300 not due.

English cases.

1331. On the same view of the most probable intention, Lord Alvanley, by two decisions,[4] cited with approbation by Sir J. Wigram,[5] established the principle that if a testator has given a legacy to a family of children without naming them, and if, after the family has either increased or diminished in number, he leave a legacy to the same children by name, the later legacy shall be taken as substitutionary to the former.

Presumption against duplication, where same legacy is twice given by the same instrument.

1332. II. LEGACIES GIVEN BY THE SAME INSTRUMENT—DUPLICATION OF SPECIFIC LEGACIES.—Legacies of quantity given by the *same instrument to the same person*, if equal in amount, are, according to the doctrine of the English law, to be regarded as repetitions of one and the same bequest; the repetition being held, upon a view sanctioned by the Civil Law,[6] to arise from forgetfulness.[7] And

[1] 9 R. 352, cited above, pp. 725-6.

[2] *Belshes* v. *Murray*, 1752, M. 11,361.

[3] The passages cited from the text of the Civil Law were – Dig. (De Legatis), lib. 30, tit. 1, fr. 34, § 3; lib. 31, tit. 1, fr. 22; Dig. (De Dote Prælegata), lib. 33, tit. 4, fr. 1, § 14; Cod. (De Legatis), lib. 6, tit. 37, l. 11.

[4] *Allen* v. *Callow*, 3 Ves. 289; *Osborne* v. *D. of Leeds*, 5 Ves. 369.

[5] *Lee* v. *Pain*, 4 Hare, 242.

[6] See Dig. lib. 34, tit. 1, fr. 18, and lib. 34, tit. 4, fr. 9.

[7] In one of the later cases, *Manning* v. *Thesiger*, 3 My. & K. 29, the principle is very distinctly brought out. The bequest

slight differences in the forms of the dispositions—as, for example, where the one legacy is to a wife simply, and the other is destined to her separate use [1]—will not entitle the legatee to the benefit of a double bequest. On the other hand, legacies of unequal amount given to the same person, and contained in the same instrument, are deemed to be cumulative; and it is immaterial whether the larger bequest is prior or subsequent in local position to the smaller.[2]

But where the two legacies are not *ejusdem generis*, both will be due.

1333. In the Scottish cases upon double legacies given by the same instrument, the provisions have been for the most part of different characters, *e.g.*, an annuity or life interest, and a pecuniary legacy; in which case there can be no doubt that both are due.[3] In *Sutherland* v. *Sutherland's Executors* [4] the testator desired that after payment of his debts the sum of £200 should be laid out at interest, to be paid yearly to his reputed daughter; and that in case of her marrying with the consent of his executors, £100 should be paid and secured as her portion. The Lord Ordinary held that on payment of the marriage portion the liferent ought to be restricted to £100; but the Court altered, and preferred the claimant to the liferent of the sum of £200, as well as to the legacy of £100.

1334. The case which perhaps comes nearest to that of simple repetition in the same instrument (where substitution would be implied) is that of *M'Innes* v. *M'Alister*.[5] The words of the bequest were: "I give and bequeath to each of my sisters, Susanna and Margaret, £200 stg. each, with an additional sum of £200 stg. to be given to Margaret, which, with the aforesaid £200, is to be

was as follows:—"I give to my brother C. T. of London, from and immediately after the decease of my husband, R. W., and in default of issue of our marriage, £100 stg.; also to my said brother C. T. an annuity of £50 stg. for life, to commence from the day of the death of my husband, R. W., and such default of issue as aforesaid, and to be paid to him half-yearly; also to my brother C. T., of or near the city of London, the sum of £100 stg." Lord Cottenham was of opinion that the testatrix's brother was entitled to the annuity, and to one legacy only of £100. See also *Brine* v. *Ferrier*, 7 Sim. 549; *Early* v. *Middleton*, 14 Beav. 453; *Early* v. *Benbow*, 2 Coll. 342; *Holford* v. *Wood*, 4 Ves. 76.

[1] *Greenwood* v. *Greenwood*, 1 Br. Ch. Ca. 31, note; *Garth* v. *Meyrick*, 1 Br. Ch. Ca. 30.

[2] See *Currie* v. *Pile*, where a testator gave his son £1000 absolutely, payable on his attaining majority; and after providing for his maintenance and education till he arrived at majority, added, "and then I give him £5000." Lord Thurlow held that the son was entitled to £6000; 2 Br. Ch. Ca. 225. See the subsequent cases in 2 Wh. & T., 6th ed. 360.

[3] See *Baird* v. *Jaap*, 18 D. 1246; and the cases of *M'Innes* and *Sutherland*, *infra*. In the first-mentioned case, the testatrix gave a legacy in this form: "To Lord Dunfermline, £2000 thousand pounds." This was held to be a legacy of £2000, on the ground that the sum was plainly set down in figures, and the words that followed it did not affect it either in the way of increase or diminution.

[4] *Sutherland* v. *Sutherland's Exrs.*, 22 Nov. 1825, 4 Sh. 220, N.E. 222.

[5] *M'Innes* v. *M'Alister* (1st case), 29 June 1827, 5 Sh. 862, N.E. 801.

settled upon herself for life." The testator also burdened his heir with an annuity of £100 a year in favour of his sister Margaret. Here the annuity was clearly additional, being a provision of a different nature from the legacies of capital, and also charged upon different estate. The two legacies of £200 were both due, because the one was expressed to be "additional" to the other; and it was so found by the judgment of the Court.

Specific legacy of same subject is necessarily a repetition.

1335. Where a specific legacy of the same thing, whether by the same or by different instruments, is given to the same person, the second bequest is obviously a repetition of the first, because the same subject cannot be twice effectually given.[1] The operation of the principle has been extended by our Courts to the case of demonstrative legacies—*e.g.*, a legacy of a sum of money given for the purpose of purchasing an article of ornament,[2] and legacies of small sums of money to be given in charity, in the shape of clothing or fuel, to the poor.[3]

Extrinsic evidence: in what circumstances admissible.

1336. It was the opinion of the Lord Justice-Clerk Hope[4] that extrinsic evidence as to the intention of the testator was in no case admissible, as there was no reason for making in regard to such questions an exception to the general rule, according to which the evidence of intention must arise on the face of the instrument. In England a distinction has been taken between the cases in which the Court raises the presumption against the intention of a double gift, and those in which the presumption is in favour of duplication. In the former class of cases, extrinsic evidence is admitted to rebut the presumption against the reception of the words of bequest in their literal signification; in the latter, such evidence is wholly excluded; the principle being, that evidence is receivable in support of the writing, but not in contradiction to it.[5] Extrinsic evidence is also admissible in England regarding the fortune and the circumstances of the testator at the time of making his will;[6] and for this purpose extrinsic evidence would also appear to be admissible according to the rules of our own law.[7]

1337. With respect to the question, how far an additional or a

[1] *Edgar* v. *Hamilton's Trs.*, 12 June 1828, 6 Sh. 963. *Per curiam* in *Hooley* v. *Hatton*, 1 Br. Ch. Ca. 390; and see *D. of St. Albans* v. *Beauclerk*, 2 Atk. 638; *Ridges* v. *Morrison*, 1 Br. Ch. Ca. 393; *Suisse* v. *Lowther*, 2 Hare, 432.

[2] *Horsbrugh* v. *Horsbrugh* (5th point), 9 D. 329; see the President's opinion, 330.

[3] *Horsbrugh* v. *Horsbrugh*, *ut supra* (8th point); and see *Baird* v. *Jaap*, 18 D. 1216.

[4] 9 D. 341.

[5] Per Sir John Leach, *Hurst* v. *Beech*, 5 Madd. 351; *Lee* v. *Pain*, 4 Hare, 216, per Wigram, V.-C.; *Hall* v. *Hill*, 1 D. & War. 116; *Charter* v. *Charter*, L.R. 7 Eng. & Ir. App. 364; see Lord Cairns' opinion at p. 376.

[6] *Martin* v. *Drinkwater*, 2 Beav. 215; *Guy* v. *Sharp*, 1 My. & K. 589.

[7] See Chapter XX., Section V. (Extrinsic Evidence).

Whether second legacy is subject to the conditions and incidents of the first.

substitutionary legacy is subject to the conditions and incidents of the original legacy, or to the destination impressed upon it, no very distinct authority is to be found in our Reports. It is clear, from the actual result of the decisions, that special destinations will not be implied in additional legacies;[1] but as to conditions, there is greater reason for presuming an intention that they should continue in operation until expressly revoked.[2] In England the rule appears to be, that a subsequent legacy, whether substitutionary or accumulative, will be affected by the conditions of the prior legacy, unless a contrary intention is manifested; but that a legacy given as a new and independent bequest—*e.g.*, if the prior legacy be expressly revoked—is not affected by such conditions; and that in no case is the subsequent gift affected by ulterior destinations impressed upon the prior gift.[3]

[1] *Lindsay* v. *Anstruther's Trs.*, 6 Feb. 1827, 5 Sh. 297; *Straton's Trs.* v. *Cunningham*, 10 March 1840, 2 D. 820; see, however, *Horsbrugh* v. *Horsbrugh* (2d point), 10 D. 824, and *Murray* v. *Smith*, 2 Feb. 1831, 9 Sh. 378,—a special case.

[2] *Harvey* v. *Harvey's Trs.*, 28 June 1860, 22 D. 1310.

[3] 2 Wh. & T.'s Leading Cases, 6th ed. 362, where the decisions are referred to.

CHAPTER XLI.

SATISFACTION AND ADEMPTION OF LEGACIES.[1]

1. Satisfaction of Legacies by Provisions.
2. Satisfaction of Onerous Provisions by Legacies.
3. Satisfaction of Debts by Legacies.
4. Satisfaction of Legacies and Provisions by Advances.

Limits and method of exposition of the subject.

1338. Satisfaction has been defined to be the donation of a thing, with the intention, expressed or implied, that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee.[2] In one class of the cases which we have occasion to consider, satisfaction is presumed from the mere circumstance of a provision being granted to a person for whom the granter was under an obligation to provide,—a presumption which is expressed by the maxim, *debitor non præsumitur donare.* In another class of cases, the presumption of satisfaction does not arise, and it lies with the granter's representatives to prove that there was an intention to satisfy or adeem the prior provision. The English cases, to the authority of which so much weight is due in relation to questions in the law of legacies, offer but a very uncertain, and sometimes a misleading light, in relation to the law affecting obligatory provisions; this chapter is therefore based exclusively upon native authority.

SECTION I.

Satisfaction of Legacies by Provisions.

By the law of Scotland, there is no presumption that a legacy is given in satisfaction of a provision.

1339. If a father gives the same sum of money to a child by two different instruments, unless it appears, either expressly or by necessary implication, that he intended the one to be in satisfaction of the other, the law of Scotland will not presume that he had that

[1] The term *ademption*, which was used in the Civil Law to denote the implied revocation of legacies, has in England been employed in a more restricted sense, to express the satisfaction of one provision by a subsequent provision of a different nature; *e.g.*, the satisfaction of a legacy by a marriage portion, or the satisfaction of a debt or portion by a legacy. In that sense it has also come into use in Scottish practice. See *Kippen* v. *Darley*, cited *infra*; Inst. 2, 21 (De Ademptione Legatorum); Dig. lib. 34, tit. 4 (De Adimendis vel Transferendis Legatis).

[2] 2 Wh. & T. L. C. 6th ed. 382.

intention.[1] It was at one time supposed that there was such a presumption; and it has been argued with much force, that the presumption against double portions, which was understood to be admitted in the law of England, is no more than the expression of a legitimate inference as to the probable intention of the granter in the absence of other elements of proof. Thus, it has been argued, if a parent, having left by his will a legacy of £10,000 to his daughter, afterwards settles £10,000 upon her on the occasion of her marriage, his intention would in ninety-nine cases out of a hundred be defeated if she were allowed to take the legacy as well as the provision.[2] Nor is authority wanting to support the theory of presumed satisfaction. In addition to the cases subsequently referred to, there is the *dictum* of Erskine, who says: "A settlement to a daughter in a marriage-contract is presumed to be granted in satisfaction or solution of all former provisions, though it should not bear the words 'in satisfaction;' because provisions granted by fathers in marriage-contracts are generally intended to comprehend the whole estate that is to be expected by the husband from the wife or her father in the name of tocher."[3]

Erroneous doctrine laid down by Erskine.

1340. The doctrine here stated must now be regarded as erroneous. When the question came for the first time before the House of Lords, in the case of *Kippen* v. *Kippen's Trustee*, it was found that—omitting one or two cases in which the Court appears to have drawn the inference of satisfaction from evidence of intention in the deed, rather than to have presumed it—there was no authority for the proposition as Erskine had laid it down. The cases on which reliance had been placed were authorities for the converse of the proposition; that is, they established that there is a presumption for satisfaction when a father leaves a legacy to a child for whom he has undertaken to provide by a previously executed contract.

Satisfaction may be inferred from evidence of intention in the terms of the subsequent gift.

1341. The observation of Erskine, however, although no longer to be received as the statement of a legal presumption, is an observation which, when used *arguendo*, may be entitled to weight, the question always being, what was the intention of the father in giving the portion?[4] The terms of the settlement—the coincidence of the two provisions as regards amount, and the form of the destination, &c.—viewed in connection with the manner in which the father has dealt with his other children, may raise a presumption against duplication. "There is," said Lord Colonsay, in

[1] Per Lord Chancellor Chelmsford in *Kippen* v. *Kippen's Tr.*, 3 Macq. 238.

[2] Per Lord Cranworth in *Kippen* v. *Kippen's Tr.*, 3 Macq. 246; and see Lord Deas' opinion, 18 D. 1189.

[3] Ersk. 3, 3, 93. See Stair, 1, 8, 2; and Bankton, vol. i. p. 154, where the same doctrine was thought to be implied.

[4] Per Lord Wensleydale, 3 Macq. 259.

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a passage quoted with approbation in the appeal, "in certain cases, such a presumption; and that presumption is more or less strong according to circumstances. It is not peculiarly strong when the one provision is in a will and the other in a marriage-contract. It is said that the presumption is, that a father brings forward everything at the marriage of his daughter, in order to secure the best terms he can from the future husband, but this rule is too broadly stated. It only means that there is a presumption that he brings forward everything that he has in contemplation of doing for her—all that he intends to bind himself to do, but not all that he may do."[1]

State of the authorities upon implied satisfaction.

1342. After an elaborate examination of all the authorities by the Court in Scotland and thereafter by the Lords who took part in the decision on appeal, it has been settled that there is no presumption in the law of Scotland against double portions in cases where the original provision is voluntary and revocable.[2] According to the opinions expressed in a more recent case in the Court of last resort, it would appear that the presumption is subject to a corresponding restriction under the law of England, and that the question whether a legacy is adeemed by a marriage-contract provision is purely one of intention.[3] In the observations of Lord Chelmsford, Ch., we perceive a different method of reasoning, quite opposed to that which prevails with us. "The question," said his Lordship, "whether a gift in a will is to be considered as a satisfaction of a portion given by settlement, or a portion given by settlement is to be taken as an ademption of a gift by will, is one of intention. It is certainly easier to arrive at a conclusion as to that intention where the will precedes the settlement than where the settlement is first and the will follows. In the case where the revocable instrument is first, and a portion is given by it if the event of marriage, or any other occasion for advancing a child, should afterwards occur, it may very reasonably be supposed that the parent has anticipated the benefit provided by the will, and has intended to substitute for it the new provision, either entirely or *pro tanto*. But where an irrevocable settlement is followed by a will, it is not so easy to infer that an additional benefit was not intended by the testator, except where he expressly declares his intention to be otherwise, or where the gift in the will and the portion in the settlement so closely resemble one another as to lead to a reasonable intendment that the one was meant to be substituted for the other."[4]

[1] 18 D. 1176.

[2] *Kippen* v. *Kippen's Tr.*, 21 May 1858, 3 Macq. 203, affirming 18 D. 1137.

[3] *Lord Chichester* v. *Coventry*, 14 May 1867, Law Rep. 2 Eng. & Ir. App. 71. The case of *Kippen* v. *Kippen's Tr.* was referred to as an authority at the bar, and by Lord Colonsay in his opinion.

[4] Law Rep. 2 Eng. & Ir. App. 82.

Cases in which satisfaction was inferred.

1343. The earliest cases upon the satisfaction of marriage-contract provisions by legacies are the two to which Lord Cranworth referred in the leading case.[1] In the case of *Dow* v. *Dow*, a bond of provision granted by a father to his daughters, and made payable by his son out of the heritable estate, was held to be satisfied by a tocher which had been paid by the father at the time of the daughter's marriage. In this case the evidence of an intention to adeem was certainly not strong; and it would rather appear, as Lord Cranworth suggested, that the Court had gone upon the principle of a universal presumption against double portions. The other case referred to, that of *Belshes* v. *Murray*,[2] is scarcely a case in point, for although the second provision was given as a marriage portion to a lady to whom the donor had previously given a bequest by bond of provision, yet the donor in this case was a collateral relative; and it does not appear that he stood *in loco parentis* to the donee. The case was argued as a question upon double legacies, under which subject it has accordingly been classed.[3] The prior legacy was held to be satisfied by the provision, apparently on the view that the alteration in the circumstances of the legatee, consequent upon marriage, had induced the granter to bestow the second provision (which was considerably larger than the first, and was settled upon the children in fee) in substitution, and not accumulatively. To the same category—that of double legacies—we may refer the case of *Moncrieff* v. *Nasmyth*,[4] where it was found that a legacy of £100, bequeathed by a testator to a lady whom he afterwards married, was not extinguished by her marriage and acceptance of a jointure in full of all she could claim by her husband's death.[5]

Modern decisions on satisfaction of legacies by provisions.

1344. Of the two modern decisions founded on in the leading cases, one[6] may be passed over in the meantime, as it is a case relating to the satisfaction of an onerous provision by a legacy. The other case, *Grant* v. *Anderson*,[7] decided in the same year, is more germane to the matter. By a settlement made in 1829 the testator bequeathed £2000 to his daughter, "to be set aside for her at the first term of Martinmas or Whitsunday after his death, and to carry interest unto her from the said term until paid; the said sum

[1] *Dow* v. *Dow*, 1681, M. 11,477; *Belshes* v. *Murray*, 1752, M. 11,361.

[2] *Belshes* v. *Murray*, *supra*.

[3] Chapter XL.

[4] *Moncrieff* v. *Nasmyth*, 1798, M. 11,380.

[5] The Court found, however, that an *annuity* bequeathed to the lady under the same settlement *was* satisfied by the marriage-contract provisions, probably because the two provisions were *ejusdem generis*. This at least proves that the question of satisfaction was regarded as *quæstio voluntatis*.

[6] *Nimmo* in R. and S. of *Auchinblane*, 29 June 1841, 3 D. 1109. See next Section.

[7] *Grant* v. *Anderson*, 19 Nov. 1840, 3 D. 89.

to be vested for her behoof on good heritable or personal security, and to continue so to be vested even after her marriage, if such shall ever happen, so that the principal sum shall form a provision for her and her family." In the following year he became a party to the antenuptial contract of marriage between his daughter and the pursuer, and thereby bound himself to lay out, at the first term, &c. (as before), the sum of £2000 sterling, upon sufficient bond, heritable or moveable, for the liferent use of the spouses and the survivor of them, and to the children of the marriage in fee, with a power of changing the securities, an obligation to reinvest, and a clause excluding the husband's *jus mariti*.

1345. Here it will be observed that there was substantial identity, not only in the sums, but in the destination and the conditions of the trusts under which the two provisions were granted. Accordingly the Court, dealing with the question as one of intention, found that, "according to the true construction of the marriage-contract, to which the late Mr. Anderson was a party, the provision thereby secured to the pursuers was in satisfaction and implement, on his part, of the provision previously made by Mr. Anderson to his daughter, the pursuer, in his trust-settlement." [1] Lord Mackenzie, indeed, seemed to have considered that there was a presumption for the satisfaction of legacies of a similar nature, and even stronger than that which obtains in reference to the satisfaction of provisions, though he afterwards rested his opinion upon the ground of intention. But the true principle was stated by Lord Fullerton, who said :—"I cannot admit that the principle laid down by Erskine is applicable here; for, in all the cases in which it was applied, the prior provision had been *in obligatione*, and the judgment was put expressly on the maxim *debitor non præsumitur donare*. But this won't apply where the prior provision is by will, and has been followed by a marriage-contract. . . . I think that the last view of Lord Mackenzie is the sound one. Viewed merely as a question of intention, the preponderance is in favour of the defenders." [2]

Question treated by Lord Fullerton as one of intention.

1346. In the case of *Rennie* v. *Rennie*,[3] which appears to have been overlooked in the discussions in the leading case, the question was also dealt with on the principle of giving effect to the settlor's intention as distinguished from the rule of presumed satisfaction. Mr. Rennie, by his trust-settlement, after making provision for his wife and younger children, gave the residue to his eldest son, John Rennie, then unmarried, to whom, by a subsequent codicil, he also directed a sum of £9000 to be paid at the first term after his

[1] 3 D. 98.
[2] 3 D. 97.
[3] *Rennie* v. *Rennie*, 10 June 1831, 9 Sh. 714.

decease. By a holograph letter, addressed to his son five years afterwards, he, on the narrative that his son was about to enter into the matrimonial state, obliged himself to subscribe any legal deed to the amount of £4000 as a security for his son's wife, the interest to be paid to her as a liferent annuity, and the fee to be given to the children at her death, with a limited power of disposal on failure of issue. Lord Corehouse found that it was "*not presumable* that he intended thereby to enlarge the provisions which he had made for John Rennie in his *mortis causa* settlements;" and further found that the sums due by virtue of the foresaid letter must be included in payment of the special bequest of £9000; and to this interlocutor the Court, on a review of the circumstances of the transaction, adhered.

Circumstances in which satisfaction is not inferred.

1347. Up to this time it had happened in all the cases that the decision, upon whatever ground rested, was in favour of *satisfaction*. With the exception of one case, in which the sums involved were not of large amount,[1] no precedent had occurred, until the case of *Kippen*, for giving effect to both provisions. The circumstances of that case are, therefore, deserving of some consideration. Mr. Kippen, the father, by his trust-settlement, directed his trustees to convey certain landed estate to two of his sons, and to set apart £4000 for each of his unmarried daughters; and declared that, as he had already provided for his two married daughters, the provisions made by him in their favour were in full of all they could claim or be entitled to receive from his estate. Provisions were also settled upon another son, and upon his widow. One of the three daughters to whom legacies of £4000 had been bequeathed afterwards became the wife of Mr. Edmiston; and in her antenuptial contract her father undertook to pay to certain trustees £5000 in name of tocher, payable £1000 at the next term of Whitsunday, and the remaining £4000 at the granter's decease, in trust for the liferent use of Mrs. Edmiston, and for the children of the marriage in fee, with a destination-over to the granter in the event of failure of issue. By two codicils he made some material alterations upon the provisions in favour of the sons and of the two unmarried daughters.

Observations on the ground of judgment in the case of *Kippen* v. *Kippen's Tr.*

1348. In arriving at the conclusion that Mrs. Edmiston's marriage-contract provision was additional to the legacy previously bequeathed to her, one element which influenced the opinion of the majority of the Judges in the Court of Session, and in the House of Lords, was the consideration of the great disparity in the relative values of the provisions which Mr. Kippen had made for the different members of his family. It being determined, in the first

[1] *Strong* v. *Strong*, 29 Jan. 1851, 13 D. 543.

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place, that there was no general presumption against double provisions, it followed by necessary implication that the testamentary provision and the provision contained in the marriage-cor[illegible] must each receive full effect, unless they could be shown t[illegible] been identified in the mind of the truster. But as the t[illegible] visions in favour of Mrs. Edmiston were different in chara[illegible] value, and were not declared to be given by way of sub[illegible] and as there was no apparent intention of dealing with the [illegible] on the footing of equality with respect to their interests i[illegible] truster's succession, the Court could only give effect to the langu[illegible] of the deeds, which was inconsistent with the notion of satisfact[illegible]

Inconsistent provisions.

1349. Allied to the questions which have been consid[illegible] there is one of less importance, viz., how to reconcile inconsiste[illegible] provisions in testamentary and onerous deeds. In a case of this kind, where a father had directed his testamentary trustees to settle his daughter's share of succession in a particular way, and he afterwards became a party to his daughter's contract of marriage, it was held that the marriage-settlement superseded the intended settlement which the father had in contemplation when he made his will.[2]

SECTION II.

Satisfaction of Onerous Provisions by Legacies.

Presumption that legacies are to be taken in satisfaction of onerous provisions.

1350. Having regard to the opinions expressed in the case of *Kippen* v. *Kippen's Trustee* by the Judges of the House of Lords, it may now be considered as settled in principle that there is a presumption that testamentary provisions are to be taken in satisfaction of provisions secured by obligation, whether in the marriage-contract of the parent or of the child in whose favour the provision is granted. The principle is very clearly stated by the Lord Chancellor in the introductory part of his opinion, where, after observing that there was no general presumption against double provisions in favour of children, he explains that there is a presumption of a more limited description, by which cases respecting children's portions were governed, and which was expressed in the formula, *debitor non præsumitur donare*. In other words, where the prior provision is obligatory, a subsequent provision will, by the law of Scotland, be deemed a satisfaction of the debt.[3] To a similar effect is the observation of Lord Wensleydale,

[1] *Kippen* v. *Kippen's Tr.*; see particularly the opinions of Lord President M'Neill, 18 D. 1174, and of Lord Chelmsford, 3 Macq. 218.

[2] Sp. Ca. *Walker's Trs.*, 1870, 8 Macph. 870.

[3] *Kippen* v. *Kippen's Tr.*, 3 Macq. 232.

that there was no rule of the law of Scotland that a settlement on a daughter was presumed to be a satisfaction of previous provisions to children, unless those provisions were *ex obligatione*.

State of the authorities upon the doctrine of satisfaction of onerous provisions.

1351. Although most of the cases upon the ademption of to[illegible]ge-contract provisions are of ancient date, yet, looking to the [illegible]amber, and to the uniform recognition of the principle that [illegible]gatory provision is satisfied by a gratuitous provision,[1] it is [illegible]ible to doubt that the doctrine in question is well established [illegible]e law of Scotland. The older cases, for the most part, have [illegible]en collected in the Dictionary, in the third division of the title "Presumption."[2] It may be sufficient to refer to a few of the [illegible]ding cases, including one or two that are reported in other parts [illegible] the Dictionary.

Satisfaction presumed where the provisions are similar in amount.

1352. In *Gallie* v. *Mackenzie*,[3] a father, on the occasion of his entering into a second marriage, granted a bond of provision for 1000 merks, payable at his death, in favour of his son by his first marriage. By a subsequent bond of provision, bearing to be additional to the first, he granted a second provision of 1000 merks, payable on the death of his wife. By his latter will and testament he bequeathed to the same son the fee of 2000 merks, liferented by his widow, but without expressly revoking either of the bonds. The Court, by a majority, considered the testament as implying a revocation of the bonds, and sustained the defences to an action claiming payment under both. The earlier cases of *Fleming* v. *Fleming*, *Davidson* v. *Randel*, and *Young* v. *Pape*,[4] were similar in their circumstances. In all of them the prior provision was made in the father's contract of marriage; and in all the prior provision was held to be satisfied by subsequent provisions of the same value.

Principle extended to cases where the provisions were unequal.

1353. The case of *Lord Yester* v. *Lord Lauderdale*,[5] which appears to have been considered a leading case, being frequently cited in the subsequent cases under the same title, extended the principle, for there the provisions were of unequal amount; the prior provision being a bond for £10,000, and the subsequent provision, which was contained in the daughter's contract of marriage, for £12,000. The Court gave effect to the plea of *debitor non præsumitur donare*. The more recent cases of *Stenhouse* and *Mathieson*,[6] referred to by Lord Chelmsford in *Kippen's* case, and

[1] 3 Macq. 259; and see Stair, 1, 8, 2; Bankton, vol. i. p. 154.

[2] See M. Dict. 11,439-11,474.

[3] *Gallie* v. *Mackenzie*, 1782, M. 11,374.

[4] *Fleming* v. *Fleming*, 1661, M. 8260; *Davidson* v. *Randel*, 1706, M. 6966; and *Young* v. *Pape*, 1680, M. 11,476, cited by Lord Stair, 1, 8, 2, and by Lord Chelmsford, 3 Macq. 235.

[5] *Yester* v. *Lauderdale*, 1688, M. 11,479. See also the earlier cases of *Cockburn* v. *L. of Cambusnethan*, 1569, M. 11,474; and *Seton* v. *Ramsay*, 1680, M. 11,475.

[6] *Stenhouse* v. *Young*, 1737, M. 11,444,

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particularly the latter, establish clearly that the presumption in question does not depend upon the correspondence in the amount of the two sums. In both cases a double claim was made; first, in respect of a provision to the children of the marriage under the father's marriage-contract; and, secondly, in respect of provisions secured to the children in their own marriage-contracts. In the latter case, the father had bound himself to pay to the eldest or only daughter of the marriage the sum of 6000 merks if there should be no male issue, and 4000 merks if an heir-male should exist and should succeed to the estate. No male issue was born of the marriage. On the marriage of the eldest daughter, her father became bound to pay her 3000 merks without making reference to the prior obligation in his own contract; and the plea *debitor non præsumitur donare* was maintained by the heir in defence to an action for payment. "The Lords found that the pursuer was a creditor for the 6000 merks, but that the after provision of 3000 merks must impute in payment thereof."

Addition of destination-over on failure of issue not sufficient to overcome presumption in favour of satisfaction.

1354. In comparing the decisions of the present century, it must be kept in view that the maxim *debitor non præsumitur donare* only expresses a presumption; and that here, just as in the cognate case of double legacies (where a contrary presumption applies), the presumption is easily displaced by evidence of intention appearing on the face of the testamentary writing. The question, of course, would not arise if the legacy was expressed to be additional to the provision. In general it will be found that the form of the testamentary provision is the determining element, and the more the two provisions are dissimilar in form the more unlikely it is that the second was intended to be a satisfaction of the first provision. In *Nimmo's* case,[1] the leading modern case on the ademption of marriage-contract provisions by legacies, the Court adhered to the rule of construction sanctioned by the decisions of the last century. This case was much criticised in the subsequent case of *Kippen* v. *Kippen's Trustee*, already more than once referred to; but the observations made upon it in the House of Lords do not throw any doubt on its authority as a precedent. Thomas Nimmo, the father, by the marriage-contract of one of his daughters, bound himself to pay to her, whom failing, to the issue of the marriage, the sum of £1000 in two portions, payable respectively, with interest, at the expiration of one year and five years from his death. By a subsequent deed of settlement, which was held to have revoked by implication a previous settlement made before his daughter's marriage, Mr. Nimmo burdened his estate

cited 3 Macq. 235; *Mathieson* v. *Mathieson*, 1766, M. 11,453; Hailes, 155.

[1] *Nimmo* in R. and S. of *Auchinblane*, 29 June 1841, 3 D. 1109.

with legacies to each of his daughters of £1000, payable in two portions at the same terms as are above mentioned, and declared that in case any of his daughters should die without issue, then the said legacy of £1000 to each of his daughters should lapse and belong to his son and his heirs.

Remarks upon application of the maxim *debitor non præsumitur donare.*

1355. This case, as Lord Chelmsford has observed,[1] was truly one in which the rule of *debitor non præsumitur donare* was applicable; because the daughter's marriage-contract, which was made by the father, and which was *in obligatione*, preceded the provisions made by her father in his trust-settlement. The observation of the noble and learned Lord is fully borne out by the terms of the judgment, which were, that "according to the just construction and true meaning of the last disposition and settlement, executed in March 1830, by Thomas Nimmo, deceased, the provision of £1000 therein appointed for the said Elizabeth is not to be taken as a separate and additional provision to that of the same amount already appointed to her in her marriage-contract of November 1825."[2] The opinions of the Judges, however, do not throw much light on the law of satisfaction of provisions by legacies. In the next case of satisfaction (which is forty years later in date) a provision of residue to younger children was held to be in satisfaction of their rights under a bond of provision granted by the father under the powers of the Aberdeen Act, and it was found that the younger children were not entitled to payment of their shares under the bond of provision except on condition of making compensation to the heirs of entail (the debtors in the bond) out of the father's general estate.[3] In other cases, where the testamentary provision was declared to be in full of obligations undertaken in the marriage-contract of a son or daughter, the child was held to be put to an election, although the provisions were dissimilar.[4]

Satisfaction not presumed where provisions not *ejusdem generis.*

Marriage-contract provision to widow and children not satisfied by legacy to children.

1356. Passing to the cases where the presumption was held to be inapplicable, the first in order is *Hay's Trustees*[5]—a well considered case. There it was found that provisions made by a father in his son's contract of marriage—consisting of an annuity to the wife, and money provisions to the children of the marriage (the amount of which is not stated) subject to a power of division—were not satisfied by a subsequent will containing, amongst other provisions, a bequest of £4000 to the children of the son's marriage and the testator's other children, with a proviso that in the event

[1] In *Kippen* v. *Kippen's Tr.*, 3 Macq. 236.

[2] 3 D. 1111.

[3] *Somervell* v. *Somervell*, 1884, 11 R. 1004.

[4] *Bontine* v. *Mitchell's Trs.*, 1885, 12 R. 984; *Crum Ewing's Trs.* v. *Bayley's Trs.*, 1888, 15 R. 507; and see *Butterey's Trs.* v. *M'Clelland*, 1879, 6 R. 564.

[5] *Clark* v. *Hay's Trs.*, 16 May 1823, 2 Sh. 313, N.E. 277; more fully reported in the Faculty Collection.

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of there not being a sufficiency of funds for payment of all the legacies, including that of £4000, the legacies should all suffer proportional diminution. The *ratio decidendi* is thus stated by the Faculty reporter:—"The Court were of opinion that the maxim *debitor non præsumitur donare* was not applicable, the provisions and the legacy being so completely different in their nature; that this was just a question between co-legatees; that the father had shown manifest indications of what was his intention; and that the whole circumstances of the case were in favour of the interlocutor of the Lord Ordinary, to which they adhered *in toto*."

Cases where the two provisions were dissimilar.

1357. In the case of *Dundas* v. *Dundas*,[1] where an heir of entail executed a bond of provision in favour of his four daughters, containing an obligation to pay to each of them £7000 and an annuity of £35 a year redeemable for £350, which was more than the entail allowed to be laid on the estate in favour of younger children, and also more than the granter was bound to settle upon them by his own marriage-contract, the Court held that the presumption against donation did not apply; but the reporter's statement of the nature of the action is so indistinct that it is not clear whether the presumption was pleaded to the effect of extinguishing the first provision, or only to the effect of reducing the sum payable under the bond to the amount which the granter was under obligation to pay. Again in *Elliot* v. *Bowhill*,[2] where the ground of judgment is most fully stated in Lord Gifford's note, it was held that the father's obligation to pay £1000 to his daughter's marriage trustees was not satisfied by a share of residue given to the daughter herself under the father's will, because, as observed, "there is no identity nor even much similarity between the two provisions. The £1000 is a direct debt due to the marriage-contract trustees, bearing interest from a fixed date. The other is a share of residue, uncertain in amount, and payable, not to the trustees, but to the daughter herself or her assignees. . . . The ultimate application of the £1000, and interest thereon, and of the testamentary provision and interest, are also different."[3]

Legacy given in satisfaction, but subject to different destination.

1358. Where a legacy or donation is given in satisfaction of a provision, but subject to a different destination, it would seem that, to the extent of the value of the *provision*, the original destination must be held to be in force.[4] An opinion to this effect was intimated by Lord Moncreiff in the case of *Nimmo*, above considered.[5] The

[1] *Dundas* v. *Dundas*, 12 June 1827, 5 Sh. 790, N.E. 731, *bis* (after p. 736).

[2] *Elliot* v. *Bowhill*, 1873, 11 M. 735.

[3] 11 M. 740; and see *Cowan* v. *Dick's Tr.*, 1873, 1 R. 119; *Hope Johnstone* v. *Hope Johnstone*, 1880, 7 R. 766.

[4] *Murray* v. *Murray*, 17 May 1826, 4 Sh. 589, N.E. 596; *Beattie's Trs.* v. *Cooper's Trs.*, 14 Feb. 1862, 24 D. 519; *Haig* v. *Haig*, 14 Feb. 1857, 19 D. 449.

[5] *Nimmo's* case, 3 D. 1120.

principle was worked out in a somewhat different way in the interlocutor of the writer (which was affirmed by the Court) in *Somervell's* case.[1] The double provision was there held to raise a proper case of election, with the usual incidents of equitable compensation and separation of the interests of the institutes and their children.

Disposition of heritable estate held not to be in satisfaction of legitim.

1359. The cases to which reference has hitherto been made relate to money provisions which were either made payable by the granter's executors, or were charged upon his heritable estate. It was decided by the House of Lords, in an early case,[2] that a son by accepting a disposition of his father's landed estate did not forfeit his right to a share of a money provision constituted by the father's contract of marriage.[3]

[1] *Supra*, p. 745.

[2] *Pringle* v. *Pringle*, M. 11,446, 5 Br. Sup. 693; Elch. "Mutual Contract," No. 15; see *Lord Cardross* v. *E. of Mar*, 1639, M. 11,440.

[3] It were much to be desired that some intelligible principles of interpretation could be laid down with reference to the doctrine of ademption. The judges of the last century were consistent; for they made every other consideration bend to the rule, "*debitor non præsumitur donare.*" In more modern times, it was seen that the rigorous application of the maxim as a presumption of law would occasionally have the effect of defeating the intention; and accordingly it is now reduced to a presumption of fact, capable of being redargued by evidence of a contrary intention. Such evidence, however, must be found within the settlement itself, and must depend upon a comparison of the two settlements, the differences in their conditions and limitations, the amount of the provisions, &c.; or on a comparison between the modes in which the settlor has dealt with the child whose provisions are in question, and his other children. It is therefore susceptible of analysis. The tendency and value of the different elements may be fixed, and the result of the different combinations estimated. Some progress in this direction has already been made in England, as will be seen from the following sketch of the more important points decided; the materials being drawn from a work, the value of which we have frequently had occasion to acknowledge, White and Tudor's Leading Cases:—

1. The general rule is, that where a legacy is given by a parent, or a person standing *in loco parentis*, as great as, or greater than, a portion or provision previously secured to the legatee, there is a presumption that it is given in satisfaction; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516, and cases cited 2 Wh. & T., 3d ed. p. 354; and though the legacy is not so great as the portion, it is still presumed to have been intended as a satisfaction *pro tanto*. A slight difference in the *destination* is not regarded. Thus, in *Lady Thynne* v. *Earl of Glengall*, 2 H.L. Ca. 131, a father having agreed to settle £100,000 consolidated stock upon his daughter, transferred one-third part thereof to the trustees of the settlement, and gave them his bond for the remainder, prestable at his death; the stock to be held by the trustees in trust for the daughter's separate use for life, and after her death for the children of the *marriage*, as the husband and she should *jointly* appoint. The father afterwards by will gave to his trustees, in trust for his daughter's separate use for life, remainder for her children (without restriction to that *marriage*), as *she* should appoint, a moiety of the *residue* of his personal estate. The House of Lords affirming Lord Langdale's decision, held that the moiety of the residue was in satisfaction of the obligation to transfer the balance of the sum of stock provided for the lady's marriage, notwithstanding the difference in the trusts.

2. The presumption that the gift is in satisfaction may be repelled by intrinsic evidence, showing an intention to give a double portion; *Lethbridge* v. *Thurlow*, 15 Beav. 334. Again, a radical difference in the nature of the provisions will suffice to

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Express satisfaction by declaration in the testamentary instrument.

1360. It is scarcely necessary to add that, if a testator expressly declare that the sums thereby bequeathed to his widow or family are additional to those which he has previously bound himself to pay by his marriage-contract, the latter cannot be held to be satisfied by the former. The contrary, however, was maintained, both in the Court of Session and on appeal, in a comparatively recent case; the argument being, that as the husband's father was a joint obligant with him in the marriage-contract provision, the son should be regarded as the primary obligant, and as intending to discharge that obligation out of the first of his testamentary dispositions. But the Courts had no hesitation in giving effect to the declared intention of the testator.[1]

SECTION III.

Satisfaction of Debts by Legacies.

How far the maxim *debitor non præsumitur donare* is applicable to legacies in favour of creditors.

1361. The class of cases which we are about to consider is distinguished from those which were the subject of the last section by the nature of the consideration for the original onerous provision, and this is necessarily an important circumstance when the intention of the granter is in view. Marriage-contract provisions, it is to be observed, although onerous in the sense of being obligatory, are granted for a rational as distinguished from a

overcome the presumption. A *contingent* interest in a legacy is, for obvious reasons, not held to be in satisfaction of a vested interest or provision; *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 Br. C. Ca. 352. It seems to have been laid down in several of the older cases (2 Wh. & T., 6th ed. 392), that a legacy charged on land was not to be considered as a satisfaction for money, nor a pecuniary legacy for land; but this distinction was disregarded by Sir W. Grant in *Bengough* v. *Walker*, 15 Ves. 507. A declaration in the settlement constituting the provision, that an *advancement* by the parent in his *lifetime* is to be taken in satisfaction, does not exclude the presumption of satisfaction by a legacy. But a share of intestate succession is not taken to be in satisfaction of a provision; for in this case there is no room for presumed intention; *Twisden* v. *Twisden*, 9 Ves. 413.

3. A second provision may in some cases be presumed to be in satisfaction of the first; *Davis* v. *Chambers*, 3 Jur. N.S. 297; but the presumption is weaker than in the case of satisfaction under a testamentary bequest, where the testator is professedly disposing of his whole property; *Palmer* v. *Newell*, 20 Beav. 32, 40, per Sir J. Romilly, M.R.

4. Legacies by strangers, not *in loco parentis*, are only held to be in satisfaction of prior provisions when given for the same purpose, *e.g.*, to buy a particular house, to purchase a commission, &c.,—*ex parte Pye*, 18 Ves. 140; *Monck* v. *Monck*, 1 Ball & B. 303. In this class of cases the principles of interpretation appropriate to the case of double legacies would seem to be applicable. See 2 Wh. & T. L. C., 6th ed. 382.

[1] *Cruikshank's Trs.* v. *Cruikshank*, 24 April 1845, 4 Bell, 179, affirming 5 D. 733. Where a testamentary provision is expressly given in satisfaction of a marriage-contract provision, the grantee must of course elect between them; *Campbell* v. *Campbell*, 14 Jan. 1865, 3 Macph. 360; *Harvey's Trs.* v. *Harvey's Trs.*, 30 Jan. 1862, 1 Macph. 345.

lucrative consideration; and there is therefore more reason for the presumption that the granter means to include such provisions in the amount which he provides to his children in the ultimate settlement and disposal of his succession. In the case of a bequest by a debtor the presumption is weaker. *Prima facie*, it is less likely that a testator, while professing to bestow a gift on the object of his favour, is in fact only providing for the payment of a lawful debt. Accordingly, it will be seen that in this class of cases, although the presumption expressed in the maxim *debitor non præsumitur donare* holds good as an abstract rule, yet it is to be received in no stronger sense than as throwing upon the legatee the *onus* of showing that there was in fact an intention to bequeath—a fact which, in most cases, may easily be established from the terms of the bequest.

Although it appears from reported cases that circumstances are generally sufficient to overcome the presumption against donation, that presumption must be recognised.

1362. The weakness of the presumption against donation in this class of cases is sufficiently apparent from the circumstance that in almost all the cases that have arisen in our Courts, it has been held that the intention of the testator was to make a gift of the legacy in addition to the value of the debt—a circumstance which, in the case of *Balfour* v. *Balfour's Trustees*,[1] was strongly urged in support of the proposition that the use of words of bequest was in itself sufficient to overcome the presumption against donation. That view of the law, however, was inconsistent with former precedents, and was expressly overruled. "From the nature of the thing," said Lord Moncreiff, "the maxim must comprehend cases in which that which is done would in itself import and have effect as a donation if the obligant or granter were not at the time debtor to the grantee. The maxim would have no meaning if it did not apply to such cases. The thing which is not to be presumed to be donation where there is a previous debt must necessarily be such, in its form and nature, that it would import donation if there were no debt. . . . Taking this view of the principle, I can by no means come to the opinion that it can never take effect where a grant, or the appointment of a payment to be made, is conceived in the form of a legacy or *mortis causa* settlement."[2]

1363. So far as regards the rule of presumption, therefore, our

[1] *Balfour* v. *Balfour's Trs.*, *infra*, 4 D. 1044. See, on the subject generally, Morrison, *voce* "Presumption," Div. iii., §§ 5 and 7. The cases are mostly of very ancient date; and as the grounds of the judicial verdict are rarely stated, we have thought it unnecessary to refer to the cases in detail.

[2] 4 D. 1052. In the same case it was observed by the Lord Justice-Clerk Hope, that having had an opportunity of seeing the very full notes of the Lord Justice-General of the opinions of the Judges in the cases of *Spaden* v. *Spaden's Trs.*, 14 Jan. 1819, F.C., and in *Hardie* v. *Kay's Trs.*, 17 Jan. 1821, F.C., he found that all the Judges recognised the relevancy of a defence against payment of a legacy founded upon the legal presumption in question.

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Doctrine of the English and Scottish law on this subject contrasted.

law upon the satisfaction of debts is in harmony with that of England; but with regard to the manner and degree in which that presumption is binding upon the conscience of the judge, or capable of disturbing the verdict to which the evidences of the testator's intention would naturally lead, a difference of opinion—more marked perhaps in theory than in practice—is apparent. It has been said that the decisions of the Court of Chancery discover a leaning or inclination to break through the rule, while the tendency of the decisions of our own Courts is rather to place it in subordination to the evidence of the testator's meaning. The tendency of the English decisions is, we have no doubt, fairly represented by the editor of the Leading Cases in Equity in the following passage:—"The rule as to the presumption of the satisfaction of a debt by a legacy is founded upon reasoning alike artificial and unsatisfactory, and it has consequently met with the censure of the most eminent judges, who, although they would not break the rule, have at the same time said they would not go one jot further, and have always endeavoured to lay hold of trifling circumstances in order to take cases out of it."[1]

Principle upon which, in Scotland, the presumption may be overcome by evidence of a contrary intention.

1364. In Scotland, however, the presumption has never been regarded as artificial in its origin or unsatisfactory in its results. On the contrary, it has been characterised as an equitable presumption founded on the natural probability of the debtor's intention; but liable to exceptions in its application, wherever there is either direct evidence of a purpose of donation, or circumstances leading to a contrary inference from that in which the rule consists.[2] In admitting evidence of a contrary intention, the Courts of Scotland do not seek to confine the application of the presumption. But allowing due weight to it, they hold that it may be displaced by more direct and positive evidence. They do not attach importance to circumstances which cannot bear on the question of intention, with the view of escaping from the fair results of a principle, the consequences of which it may be thought desirable to restrict; because the presumption is merely a presumption of fact, and does not preclude inquiry into the meaning of the testator. At the same time, it must be confessed that the tendency of such a principle of interpretation is to reduce the law upon the whole matter to a state of great uncertainty. The judgments in most of the cases are verdicts; and little can be gathered from the reported opinions but a record of the impressions made upon individual minds by the general tenor of the deeds which were the subject of

Uncertainty of the law consequent upon the application of the principle.

[1] 2 Wh. & T. L. Ca. 6th ed. 388; *Lady Thynne* v. *Earl of Glengall*, 2 H.L. Ca. 153; *Richardson* v. *Greese*, 3 Atk. 65.

[2] See Lord Moncreiff's opinion, 4 D. 1052.

construction. In this state of the law, all that can be attempted is to point out the circumstances which have been considered to militate against the presumption expressed in the *brocard*, and which, when combined with other circumstances of a similar tendency, will effectually overcome it.

General direction to pay debts immaterial to the question of satisfaction.

1365. In the first place, it would seem that no weight is to be attached to a circumstance which in England has been held fatal to the presumption—viz., that the trust-deed contains a direction to pay debts, and that such direction precedes the order to pay legacies; for, as has been observed, every trust-settlement implies such a direction; and the obligation of the trustees to pay debts, and to account for the funds to creditors, receives no additional strength from the testator's injunction.[1] It was observed, in the leading case, that differences as to the term of payment are of no great importance to the question.[2] And this seems just; because a testator may mean that a legacy should be taken in satisfaction of the debt, although the time of payment is postponed, if the loss of interest consequent upon postponement is compensated by a considerable addition to the principal sum.[3]

Presumption for satisfaction not overcome by difference as to term of payment.

Legacy with a destination-over not presumed to be in satisfaction of a debt.

1366. The fact that there is an ulterior destination of the legacy to a different person, or to a different class of heirs from those who would be entitled to claim payment of the debt, is an element of some importance, and will in general be sufficient to overcome the presumption; for, in the case supposed, if the original legatee predecease the testator, there is then no longer any *concursus debiti et crediti*. The possibility of the right to the two claims coming to be vested in different persons must be held to have been within

[1] Per Lord J.-C. Hope in *Balfour* v. *Balfour's Trs.*, 4 D. 1054. In England it was settled by the case of *Chancey*, a leading authority on this subject, that the Court was bound to infer, from an expressed direction for payment of debts *and* legacies, that it was the intention of the testator that both the debt and the legacy should be paid to the creditor,—1 P. Wms. 408; and see *Richardson* v. *Greese*, 3 Atk. 65; *Field* v. *Mostin*, Dick. 543; *Hailes* v. *Darell*, 3 Beav. 324, 332. In *Jeffries* v. *Michell*, 20 Beav. 15, the testator gave, after payment of his debts, certain legacies, and amongst others a legacy of £150 to his granddaughter, to whom he was indebted to the same amount. Here, said Sir John Romilly, M.R., there was an express direction to pay both the debts and the legacies: the testator may have supposed that his granddaughter could not take both the debt and the legacy; but if so, he had failed to express his intention. Both sums were held to be due. It seems that a direction to pay debts without mentioning legacies is not sufficient to rebut the presumption against donation; *Edmunds* v. *Low*, 3 Kay & J. 318, 321; *Rowe* v. *Rowe*, 2 De G. & Sm. 297, 298.

[2] 4 D. 1055.

[3] The cases in which differences in regard to the time of payment were held of essential importance are somewhat antiquated; and we are not satisfied that such circumstances would receive the same consideration from the Court of Chancery now, if an opportunity were afforded of reconsidering the point. See, however, *Spaden* v. *Spaden's Trs.*, 1 Sh. (App. Ca.) 164, cited *infra*, § 1368, as to how far the presumption may be repelled in the case of a postponement for an indefinite period of time.

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the contemplation of the testator. This, in fact, was the only and sufficient ground, in the leading case of *Balfour* v. *Balfour's Trustees*,[1] for displacing the rule. The testatrix was indebted to her brother in the sum of £3000 which he had advanced, in conformity with the wishes of his father, to enable her to purchase a house; and, having afterwards acquired a large fortune, she bequeathed, first, £16,000, and afterwards, by a codicil, £20,000 to this brother. The money advanced for the purchase of the house was considered to be an heritable debt, while the legacy of £20,000 was of course chargeable against the executry estate, and the destination was to the brother's "heirs, executors, and assignees." The destinations being to different heirs, the Court held that the debt was payable in addition to the legacies.

Legacy given subject to a condition not presumed to be in satisfaction of debt.

1367. Where a legacy is given upon a condition, it is presumed that the testator did not intend it to be in satisfaction of his debt; for he could not suppose that he was entitled to adject conditions to an obligation the fulfilment of which might be unconditionally enforced. This was the principle of the decision in *Hunter* v. *Nicolson*,[2] where a legacy of £1000, given by a father to his daughter on condition that he should succeed in recovering his share of the succession of his deceased brother, was held not to be given in satisfaction of a claim for £1000, arising upon a verbal promise to pay that sum made on the occasion of her marriage.

Postponement equivalent to a condition.

1368. Postponement to an indefinite time is virtually a condition, and this is held sufficient to rebut the presumption for satisfaction. In *Spaden's Trustees* v. *Spaden*,[3] the testator left a legacy of £300 to his foreman, to be paid to him at the first term after his mother's death. The legatee claimed in addition to the legacy a sum of £500, alleged to be due to him partly for money advanced, and partly as remuneration for services rendered. The Court, and Lord Eldon on appeal, were of opinion that the maxim *debitur non præsumitur donare* did not apply to this case, chiefly on the ground that the deceased owed the petitioner a debt at his death, as had been now ascertained by the Court; that a person could not intend to pay a debt by a legacy, payment of which was postponed to an indefinite distant period; and that the deceased specially directed that all his debts should be paid before this legacy.[4]

Legacy not held to be in satisfaction unless it is *ejusdem generis* with the debt.

1369. Lastly, where the legacy and the debt are not *ejusdem generis*, *e.g.*, if the one is an annuity and the other is a fixed sum, the inference as to the testator's intention is the same as in the case of double legacies. As the one sum cannot be directly and im-

[1] *Balfour* v. *Balfour's Trs.*, 10 March 1842, 4 D. 1044; see *Ritchie* v. *Ritchie*, 6 June 1858, 20 D. 1093.

[2] *Hunter* v. *Nicolson*, 29 Nov. 1836, 15 Sh. 159.

[3] *Spaden's Trs.* v. *Spaden*, 5 July 1822, 1 Sh. (App. Ca.) 164, affirming, on this point only, 14 Jan. 1819, F.C.

[4] 1 Sh. (App. Ca.) 167.

mediately applied in satisfaction of the other, it is presumed that there was no intention to adeem, and both are payable.[1]

Application of the principle to claims for wife's share of goods in communion.

1370. The principle admits of being further illustrated by the cases where claims against a husband's estate for the wife's share of executry have been met by the plea of satisfaction in consequence of the husband having left a legacy or provision to the claimant. As in this class of cases the debt is due by the husband in a special character, namely, as *executor* or intromitter with his wife's succession, it may be doubted whether there is any proper concourse between the two claims, so as to admit of the application of the maxim.

1371. The leading case is *Hardie* v. *Kay's Trustees*,[2] where the claim was not held to be satisfied by the legacy. The subsequent case of *Cullen* v. *Wemyss*[3] went upon the plea of *mora;* and in *Sinclair* v. *Rorison's Executor* the legacy to the testator's daughter was expressly declared to be inclusive of her mother's share, and presumption was thus excluded.[4] In an early case, however, the presumption was admitted to the extent of holding a claim by a daughter against her father, as executor of her grandfather's will, satisfied by a provision which he had granted to her *inter vivos*.[5]

SECTION IV.

Satisfaction of Legacies and Provisions by Advances.[6]

Whether the rule *debitor non præsumitur donare* is applicable to the satisfaction of legacies by advances.

1372. The cases to which we refer are those in which a settlor or testator, after making a testamentary provision in favour of a child or legatee, makes advances to the same individual in the shape of pecuniary payments during his lifetime. In this class of cases, it would seem the presumption *debitor non præsumitur donare* would not apply; for even in the case of an onerous provision, *e.g.*, an obligation undertaken in a marriage-contract, the father is not a debtor to the child at the time of making the advance, the obligation being in the case supposed only prestable at his death, and payable out of his free estate.

Advances by a father or person *in loco parentis*.

1373. This peculiarity, affecting the satisfaction of provisions by advances, was pointed out by Lord Murray in his interlocutor in *Scott* v. *Scott*,[7] reporting the case to the Second Division of the

[1] *M'Dowall* v. *Gordon*, 10 July 1833, 11 Sh. 952.

[2] *Hardie* v. *Kay's Trs.*, 17 Jan. 1821, F.C.

[3] *Cullen* v. *Wemyss*, 16 Nov. 1838, 1 D. 32.

[4] *Sinclair* v. *Rorison*, 11 Dec. 1852, 15 D. 212.

[5] *Fife* v. *Nicolson*, 1751, M. 2309. On the subject of this claim see Chapter VI., Section I., *in fin.*

[6] A debt due to a deceased person by the party who succeeds as his legal representative is extinguished by confusion, although action has been raised upon it in the lifetime of the defunct. Creditors therefore cannot claim it as assets of the defunct's estate,—*Elder* v. *Watson*, 2 July 1859, 21 D. 1122.

[7] *Scott* v. *Scott*, 2 June 1846, 8 D. 971, 796. Compare this case with *White* v. *White*, 28 Jan. 1841, D. 468, where

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Court. In that case, a father, by his postnuptial contract of marriage, bound his estate in payment of a sum of £3000 to each of his daughters, payable at the first term after his death, with interest from that term until payment, declaring that the provisions should be in full satisfaction of legitim and executry; and by a subsequent trust-deed his general estate was made liable to relieve his heirs of entail of the amount of the provisions in question. One of the settlor's daughters having become a widow during her father's lifetime, and being without the means of supporting herself and family, an annual allowance was given to her by her father, from whom she also had the use, rent free, of a house and farm. The sums which were advanced to her amounted in all to about £1300, as appeared from entries in the father's day-book, some of which were also transferred in his ledger into an account opened in her name. On the part of the lady's brother, who succeeded to the entailed estates, it was maintained that the provision in her favour had been satisfied to a considerable extent by the advances in question; as, after giving credit to her for an annuity varying from £15 to £30, which it appeared from certain memoranda left by the father that he had intended to settle upon her as an additional provision, there remained advances in excess of the annuity to the extent of nearly £500. The Judges of the Second Division were divided as to the applicability of the presumption against donation.[1] In substance, however, the Court seem to have acquiesced in the opinion indicated by the Lord Ordinary; because in the consideration which they gave to the facts of the case no weight whatever appears to have been attached to the presumption.

Such advances only imputable in satisfaction of legacy where there is evidence of intention.

1374. The ratio of the decision appears to have been that there was no evidence of an intention to impute the advances in satisfaction of the provision. The entry of the advances in the father's books was held in this, as in the older cases,[2] not to be decisive of

property purchased for the granter's sons in order to give them an electoral qualification was held to be a donation, and not imputable towards the sons' shares in the succession. Advances by a father to a son were held not to be given in satisfaction of bonds of provision in *Erskine* v. *Erskine*, 24 May 1827, 5 Sh. 697, N.E. 650, and *Miller's Trs.* v. *Miller*, 23 Feb. 1848, 10 D. 767; *secus* in *Burrell* v *Burrell*, 15 May 1828, 6 Sh. 801, where a bill was taken for the sum advanced.

[1] See the opinions of Lord J.-C. Hope and Lord Cockburn (8 D. 799, 806), who thought that the maxim applied generally, but was excluded by the circumstances of the case. Lord Medwyn, on the contrary, thought that the presumption was excluded, on the ground that Mr. Scott was neither by legal or voluntary obligation a debtor to his daughter; and added that such payments could not be set off against a debt due after death, unless under very peculiar circumstances of explanation and agreement on both sides.

[2] *Campbell* v. *M'Alister*, 18 Jan. 1827, 5 Sh. 219, N.E. 204; *M'Dougall's Crs.* v. *M'Dougall*, 31 Jan. 1804, M. "Bankrupt," App. No. 21; *Drummond* v. *Swayne*, 28 Jan. 1834, 12 Sh. 342.

the intention to keep up the advances as a debt, because such entries would be made by a person in the habit of keeping an account of his personal expenditure, for the purpose of showing what had been done with the money.

Lord Eldon's judgment in *Miller* v. *Miller*.

1375. It was observed by the Lord-Justice Clerk,[1] in commenting upon the case of *Miller* v. *Miller*, that the application of the maxim *debitor non præsumitur donare* had been recognised in the latter case by the House of Lords. Lord Eldon, however, did not directly refer to the maxim, nor does it appear to us that the question of its application was raised before him.[2] The question was as to the power of a father to make additional provisions to his younger children, after having bound himself in his eldest son's contract of marriage to convey the whole estate to him, under burden of the provisions made by him for his younger children. The judgment of the House was to the effect that the provisions therein referred to were provisions already made, and that subsequent provisions *intuitu mortis* were either to be considered as a violation of the contract, or as being in satisfaction of the provisions made for the same children by deeds executed before the date of the marriage-contract. But as to advances or payments of money *inter vivos*, it was expressly found that such payments, not being of the nature of permanent provisions, "ought *not* to be considered as in extinction or satisfaction of the provisions so made for the children previous to the said marriage-contract, and intended to take effect on Mr. Miller's death."[3]

Result of the authorities: no positive presumption for satisfaction by such advances.

1376. On the whole, it may be concluded that there is no positive presumption that advances made by a father to a child are designed as anticipatory payments of the provisions in his favour contained in his settlements, but that slight evidence of such an intention on the part of the father will be sufficient to raise a presumption;[4] the question always being, whether the father intended a donation or a loan. The cases of *Robertson* v. *Robertson's Trustees* and *Webster* v. *Rettie*,[5] where the point was raised in a question with other children claiming legitim, may be consulted with reference to the kind of evidence sufficient to establish an intention to impute advances to a son in satisfaction of his interest in the succession.

Rule as to advances by a person not standing *in loco parentis*.

1377. In the case of advances by a person not standing *in loco parentis*, the general presumption against donation comes into

[1] 8 D. 799.

[2] See the case, *Miller* v. *Miller*, 30 July 1822, 1 Sh. (App. Ca.) 308.

[3] 1 Sh. (App. Ca.) 316.

[4] Conversely, where an advance is given on an occasion when it is usual for a parent to make a donation to his child, *e.g.*, to a daughter on her marriage, it will not be held to be in satisfaction of a provision which the parent was under an antecedent obligation to grant,—*Greenock Banking Co.* v. *Smith*, 17 July 1844, 6 D. 1340.

[5] *Robertson* v. *Robertson's Trs.*, 15 Feb. 1838, 16 Sh. 554; *Webster* v. *Rettie* 4 June 1859, 21 D. 915.

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operation. In this class of cases, accordingly, advances are regarded as loans in the absence of proof to the contrary, and, as such, may be recovered by the granter's executors, or imputed in satisfaction of the donee's interest in the succession.[1]

Effect of express declaration that advances are to be taken as in satisfaction of legacy or provision.

1378. If a testator declare by his will or deed of provision that advances made in his lifetime shall be taken in satisfaction of the provision, questions that might arise as to the presumption applicable to the circumstances are generally excluded by the terms of the declaration. *Hutchison* v. *Skelton*[2] is an authority on the construction of this very common form of provision. The testator, by his trust-settlement, provided to each of his daughters the sum of £1500, to be secured, with interest, at his death, to the daughters for their liferent use, exclusive of the husbands' *jus mariti*, and to their children respectively in fee, subject to the provision "that whatever sum or sums have already been paid, or may in my lifetime hereafter be paid, to any or either of my said children, . . . shall be held and accounted, without reckoning interest thereon, as so much of the provision falling to such child or children under this deed of settlement." To one of his daughters the testator had advanced £1000 in his lifetime; and the Court was of opinion that this sum could not be taken as in satisfaction of the testamentary provision, as it was no satisfaction to the children of that daughter that their mother had received payment of the provision in advance. But the House of Lords reversed the decision, holding that where the intention to satisfy a provision to a family by advances to the parent was expressly declared, the circumstance that the children received no benefit from the advance was immaterial. As to the reasonableness of the declaration which the testator had made, his intention evidently was to deal equally with all the members of his family—an intention which would be defeated were one of the daughters allowed to take the benefit of the advance without imputing it in satisfaction of the disposition in her favour.[3]

In such cases, provision to a daughter and her children may be satisfied by advances to the daughter herself.

[1] *Buchanan* v. *Mollison*, 16 June 1824, 2 Sh. (App. Ca.) 445; *Murray* v. *Murray*, 5 Dec. 1843, 6 D. 176; and see *Fyfe* v. *Kedslie*, 6 March 1847, 9 D. 853.

[2] *Hutchison* v. *Skelton*, 18 July 1856, 2 Macq. 492, reversing 15 D. 570; *Berry* v. *Downie*, 10 July 1839, 1 D. 1216. This case was appealed, and the best report of the opinions in the Court of Session and in the House of Lords is in 19 Scottish Jurist, 447; see also *Cairns* v. *Cairns*, 11 March 1829, 7 Sh. 571, and case decided in March 1894 (1st Division).

[3] 2 Macq. 497, per Lord Ch. Cranworth. Cases of the kind considered in this section appear to be judged of in England on the same principles as with us. See the recent cases of *Ravenscroft* v. *Jones*, 33 L.J. Ch. 482; and *Nevin* v. *Drysdale*, Law Rep. 4 Eq. Ca. 517.

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